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BY

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Let observation, with extensive view,
Survey mankind from China to Peru.
SAMUEL JOHNSON.

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HINDU LAW TO-DAY

[*Contributed by* THE RT. HON. SIR GEORGE RANKIN]

Agency by which Hindu Law has developed.—As known to British judges and administrators in 1833, the Hindu law was sadly lacking in precision; and, in spite of the projects of the Charter Act of that year, the task of rendering it adequate to the needs and workable in the conditions of modern India was given, or perhaps one should say was left, not to a Law Commission or to learned Sanskritists but to the tribunals as part of their daily work. The part played by the Indian legislature has of recent years been very important, and some of the older enactments have had far-reaching effect, but on the whole it is noticeable that the work of the legislature has followed upon the work of the Courts, sometimes introducing definite reforms required by the sentiment of recent times, and sometimes rendering more definite and workable the law established by decisions. We are here concerned with the development of the Hindu law and not with enactments which override or exclude it—e.g., abolishing sati or slavery or the penalties of change of religion. If one looks solely to the substantive law, a review of the enactments which directly modify and supplement it[1] will show that the legislature has with fair consistency left the Courts to formulate the Hindu law, interfering seldom and only on specific points with the trend of judicial decision. In any country the activity of a legislature to reform the law and to bring it up to date may now be regarded as a necessity of the national life; and there is perhaps special need of such activity to modernize the Hindu law from time to time, having regard to its antiquity and to the slowness with which quasi-religious ideas are abandoned. The Hindu Women's Rights to Property Act of 1937 is an outstanding instance of a sweeping reform made after the Courts for many years had been following and applying texts received as authoritative.

The tribunals have had to deal with difficult material, and with more and more of it as Sanskrit studies and discoveries progressed. They have even had to classify—in point of age, of authority, of locality—the ancient scriptures regarded as authoritative so far as *vyavahara* (judicial matters) is concerned. It may be of interest, if not of service, to consider how in fact since 1833 the Hindu law has been ascertained, defined, interpreted and developed, and to frame an opinion as to the success or failure of the efforts of the Courts in that exacting enterprise.

Nature of the Task.—As important questions of law tend to be taken on appeal, we find the Judicial Committee of the Privy Council playing a foremost part in the definition of Hindu doctrine. In a leading case upon the thorny topic of adoption, the question was whether the adoption of an only son was void by the Hindu law; and it was decided that the ancient Smriti texts which disapproved in strong terms of such adoptions—the text writer mainly appealed to was Vasishtha—were hortatory or minatory only, and did not involve that such an adoption if in fact made was illegal and void. The Judicial Committee took occasion to observe upon the character and difficulties of their task:—

"The difficulty which first meets the eye is the variety of judicial opinions and of opinions in treatises, which during the last quarter of a century have been gathering into definite opposite channels in the different areas of jurisdiction. There are also other difficulties beyond. Many of the judicial decisions relied upon are embodied in imperfect reports or in mere notes of points. The question is complicated by the use of different modes of adoption not always clearly specified and by the intrusion of special local or tribal customs. And the original authorities on which all the conflicting opinions alike are based are written in Sanskrit, which for many centuries has been a dead language known only to a few learned people, which hardly any of those who have been called to judgment have understood, the translations of which are more or less disputed, and of which it is averred probably with truth that its exact phases of meaning cannot be caught, except

[1] Such as is given in Mulla's *Hindu Law*, 9th edition (1940), pp. 2 and 3.

by those who have studied closely and as a whole the language and the works of the particular writer under consideration. Their Lordships have, however, one advantage over their predecessors in these inquiries. The greater attention paid of late years to the study of Sanskrit has brought with it more translations of the sacred Hindu books and closer examinations of texts previously translated." [2]

In 1833 many fundamental matters had not been settled by decisions of the Courts, and though upon these there might be little difficulty in point of theory or upon the texts, there was necessarily an element of doubt which only decisions could remove. In 1831 the Supreme Court at Calcutta in *Juggomohun Roy* v. *Srimati Neemoo Dossee*[3] addressed a letter to the Sudder Dewani asking whether in Bengal a Hindu with sons can sell, give or pledge without their consent immovable ancestral property. The answer was that he can. Chief Justice Grey attributed this difference between the Bengal and Benares Schools to the mercantile character of the population in Bengal. But Ryan J. declined to enter into the subject as a question of Hindu law, because he considered that the Supreme Court had uniformly held that a father could dispose of ancestral property and that the point must be taken as settled. This case brings into relief the growing importance of the action of the Courts themselves in defining the Hindu law. Within fifty years thereafter decisions had covered so much of the ground that the case law, rather than the texts, required attention from the lawyer.

Judicial Methods Illustrated : The Element of Authoritative Construction.— It is possible to illustrate from the law reports the general character of the method which has had effect during the century which has elapsed since 1833—the process which has hitherto been preferred to codification.

In 1833 certain old suits were taking their course through the Provincial to the Sudder Court in Madras. In 1846 they came before the Judicial Committee[4] on which as Assessor sat Sir Edward Ryan, who had been Chief Justice of Bengal when Macaulay was legal member of the Council. The appeal raised a fundamental question of adoption—whether a Hindu who had a son living could adopt another son. V. a Zemindar and a *Sudra* being childless had in 1798 adopted I. Having married again he in 1807 adopted R. The Sudder Court held the adoption of R to be valid. The Privy Council reversed, holding that a second adoption of a son—the first son being alive and retaining the character of a son—was an illegal and void act. The point had long been disputed, and it is instructive to see how the Judicial Committee approached such a question. In the judgment delivered by Mr. Pemberton Leigh (afterwards Lord Kingsdown) three classes of authority were distinguished:

(1) opinion of the Pandits;
(2) Hindu treatises; and
(3) European authorities.

The preponderance of opinion among the pandits was in favour of the second adoption. The texts—" the native authorities," as they are styled— were not reconcilable with each other, Jagannatha saying that the better opinion was that the adoption was valid, while the Dattaka Mimamsa and Dattaka Chandrika—treatises upon the particular subject of adoption—were strong against its validity and were supported by other texts.

" If we are to form our opinion of the law from the effect of these authorities we can have no hesitation in coming to a conclusion adverse to the validity of a second adoption. At the same time it is quite impossible for us to feel any confidence in our opinion—founded on authorities to which we have access only through translations—and when the doctrines themselves and the reasons by which they are supported and impugned are drawn from the religious traditions, ancient usages and more modern habits of the Hindus, with which we cannot be familiar."

Turning in this spirit to the " European authorities," they found that there

[2] Per Lord Hobhouse. *Sri Balusu Gurulingaswami's case* (1899), L.R. 26, I.A. 113.
[3] Clarke's *Notes of Decided Cases* p. 10. Morton's *Reports*, p. 90.
[4] *Rungama* v. *Atchama* (1846) 4 M.I.A. 1.

were two decisions of a dubious character, but that Strange, Sutherland and Steele had all expressed a view adverse to a second adoption. Sir William Macnaghten's authority carried the day.

" But by far the most important authority is Mr. William Macnaghten, whose ' Principles and Precedents of Hindu Law ' were composed as appears from the Preface after collecting all the information that could be procured from all quarters, and after a careful examination of all the original authorities and of all the opinions of the pundits recorded in the Sudder Court for a series of years. . . .We are informed by our very learned Assessor, Sir Edward Ryan, that this work of Mr. Macnaghten's is constantly referred to in the Supreme Court as all but decisive of any point of Hindu law contained in it, and that much more respect would be paid to it by the judges there than to the opinion of the pundits. Upon the particular point in question, Sir Edward adds all the weight of his own high authority, concurring as he does entirely in the law as stated in Macnaghten."[5]

Decisions and the Texts.—The element of authoritative *construction* to be found both in accepted texts and in decisions was noticed in *Thakoorain Sahiba* v. *Mohun Lall* (1867) 11 M.I.A. 386, where it was held that under the Mitakshara a sister's son in the absence of lineal heirs has no title to be a reversioner on the widow's death.

" Were the arguments in favour of the construction which Mr. Piffard would put upon the Mitakshara far stronger than they really are, their Lordships would nevertheless have an insuperable objection, by a decision founded on a new construction of the laws of that Treatise, to run counter to that which appears to them to be the current of modern authority. To alter the law of succession as established by a uniform course of decisions, or even by the dicta of received treatises, by some novel interpretation of the vague and often conflicting texts of the Hindoo commentators would be most dangerous, inasmuch as it would unsettle existing titles."

This was repeated more pointedly in a later case—*Chotey Lall* v. *Chunnoo Lall* (1878) L.R. 6 I.A. 15—when it was held that a daughter's estate was a limited estate like a widow's.

" Their Lordships think that after the series of decisions which have occurred in Bengal and Madras it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts; and they agree in the observations which are to be found at the end of the judgment of the High Court, that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions unless indeed it is manifestly opposed to law and reason."

Schools of Hindu Law.—*Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 Moore's Indian Appeals 397 raised the question whether in Madras a Hindu widow could adopt a son to her husband without his express authority—the contention being that by the law current in what is known as the Dravida country she was competent to do so. This raised the question of different schools of Hindu law—the existence of which has been confidently affirmed by Colebrooke and many others. On this, Sir James Colvile's judgment said:

" The remoter sources of the Hindu law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent Commentaries. The Commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose."

He pointed to the fact that the Mitakshara and the Dayabhaga equally rely on Yajnavalkya and that there are differences among schools, all of which accept the Mitakshara—e.g. Mithila and Mayukha. Upon a review of the differing texts it appeared that the difference relates rather to what should be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband.

" The duty therefore of an European Judge who is under the obligation to administer Hindu law is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For under the Hindu system of law clear proof of usage will outweigh the written text of the law."

[5] 4 M.I.A. at p. 101.

Thirty years later—in *Bhagwan Singh* v. *Bhagwan Singh* (1898) L.R. 20 I.A. 153—this principle had to be further elucidated. The question was whether a Hindu of the twice-born classes could adopt a mother's sister's son. It was forbidden by certain ancient texts (Sakala and Saunaka) which were quoted in the Dattaka Chandrika and the Dattaka Mimamsa—works which had been received as authoritative expositions of the general Hindu law. On the other hand the prohibition was not to be found in Manu, Vasishtha, Yajnavalkya or Narada. But a strong current of decisions had recognized the prohibition, and the Judicial Committee decided that the question would not be treated as an open one. Edge C.J. had sought to apply the test whether the prohibition was founded on the proof of a custom, quoting what Sir James Colvile has said as to the duty of a European judge. But the Judicial Committee in the judgment delivered by Lord Hobhouse said of that statement:

"The whole passage is framed with reference to the fact that different schools were found to take different views of the general law on the point before the Board. But their judgment gives no countenance to the conclusion that in order to bring a case under any rule of law laid down by recognized authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. . . . It seems to their Lordships that, to put one who asserts a rule of law under the necessity of proving that in point of fact the community living under the system of which it forms part is acting upon it, or defeat him by assertions that it has not been universally accepted or acted on, would go far to deny the existence of any general Hindu law; and to disregard the broad foundations which are common to all schools though divergencies have grown out of them."

An instructive example of the Privy Council's attitude towards the Hindu texts is to be found in *Moniram Kolita* v. *Kerry Kolitani* (1879) L.R. 7 I.A. 115, where it was held that in Bengal a woman who has once inherited her husband's estate does not forfeit it by unchastity. Two texts were put forward as affirming a forfeiture in such cases—one of Manu the other of Catyayana. This view had the high authority of Dwarkanath Mitter J. But the texts were not considered to affirm the proposition contended for; the later decisions were against it; the general rule was clear that an estate once vested was not divested by any act which would have formed ground of exclusion; and it was shown that great mischief might attend the rule suggested. On the question of interpretation it was said by Sir Barnes Peacock (p. 150-1) in the judgment of the Board:—

"But even if these words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from Catyayana's text taken by itself, as what are the conclusions which the author of the Dayabhaga has himself drawn from them. It is to that treatise that we must look for the authoritative exposition of the law which governs Lower Bengal, whilst on the other hand nothing is more certain than that in dealing with the same ancient texts, the Hindu commentators have often drawn opposite conclusions."

Smritis.—The position of the Smritis in Hindu literature and history was but ill-discerned in 1833; we may perhaps take Max Muller's letter to William Morley on July 29, 1849, as a modern light upon a difficult and fundamental matter.[6] In Mandlik's work (1880) will be found mention of a very much larger number of Smritis than the twenty mentioned in Yajnavalkya or those given in the *catalogue raisonné* which Colebrooke prefixed to his translation of Jagannatha and his "Two Treatises." As in Maine's words, "chronology has absolutely no existence among Hindu writers" of these far distant ages, such writings make intractable material even to competent Sanskritists bent on applying the historical method.[7] Before Maine's "Ancient Law" (1861) the historical method or even the historical spirit was not much applied to legal matters, and the main outlines of the Hindu law were settled by decisions of learned judges whose notions of the authority of texts were robust, rigid and direct rather than historical. That

[6] Morley. *Digest* (1850), v. I. Introd. p. cxcvi. *Admin. of Justice in India* (1856), p. 207.

[7] Oriental thought and literature according to Sir H. Maine "is elaborately inaccurate; it is supremely and deliberately careless of all precision in magnitude, number and time." *Village Communities* (1871), p. 26.

veneration was due to the Smritis was of course fundamental to Hindu ideas of law.

" God having created the four classes had not yet completed his work; but in addition to it lest the royal and military class should become insupportable through their power and ferocity, he produced the transcendent body of law; since law is the king of kings, far more powerful and rigid than they. Nothing can be mightier than law by whose aid, as by that of the highest monarch even the weak may prevail over the strong."

But though at first sight it would hardly seem practicable to regard such a literature as affording authority in a modern court, the difficulty of the courts has not been so much with the Smritis or ancient texts as with the Commentaries (nibandhas) or digests of later date. This is partly because the age of the Smritis has made many of their directions so plainly unsuitable to modern times that no one professes to follow them; as is pointed out for example by Sir William Jones at p. 438 of his translation of Manu. But it is also because the Smritis themselves make clear that *achara* or usage is the source of authority in matters of *dharma*.[8]

Morley states quite bluntly and correctly:

" The Smritis themselves, which are received in common by all the schools, are no longer *final* authorities, even where they do treat of law. Vrihaspati says:

'A decision must not be made by having recourse to the letter of written codes, since, if no decision were made according to the reason of the law (or immemorial usage) there might be a failure of justice.' The Manava Dharma Sastra itself is indeed now regarded ' as a work to be respected rather than in modern times to be implicity followed.' (Strange. Hindu Law, vol. I pref., p. XIII, 2nd Ed.) For final authority then, in deciding questions of law, recourse must be had to the Commentaries and Digests."[9]

This last proposition has been repeatedly affirmed by the Privy Council, though they have sometimes been reproached for not having consistently applied it,[10] learned Sanskritists being unduly inclined to assume that infallibility on every point is necessarily attributable to the authoritative commentaries. Nevertheless it does sometimes happen that a case turns upon the Smriti texts themselves. Thus the question whether the adoption of an only son is valid or is illegal and void turned mainly[11] on the question whether the text of Vasishtha was to be interpreted as containing moral disapprobation of the taking of an only son or amounted to a legal prohibition. And in a very recent case[12] from Madras the Privy Council were asked solely on the strength of a text of Vrihaspati to hold that in the insolvency of his sons the father's debts must be paid in priority to the sons' own debts out of joint family property which on the father's death came by survivorship to be the sons'. Reasons were given by the Board, however, which prevented them from giving effect to this appeal to Vrihaspati.

Commentaries.—As to the Commentaries, the endeavour of the Courts to ascertain what doctrine in any particular matter is received as law in the part of India with which they were concerned has resulted in the recognition of five different " schools " of law. The word " school " must be taken in a very loose sense if only because four of these may be regarded as subdivisions of those who follow the Mitakshara. The " schools " differ in that they recognize different books as dominant commentaries supplementing or modifying or in part displacing the Mitakshara. The general effect can be seen from any of the text books (e.g. Mulla: Hindu Law, Ch. II) and need not be here set out. Some nine or ten judgments of the Judicial Committee contain authoritative views as to the main writers who are quoted in the Courts.[13] They deal amongst other

[8] Mandlik Introd. p. 7 Jones *Manu*. p. 228.

[9] Morley. *Digest*, v. I., Introd. p. cci. *Administration of Justice in India*, p. 213.

[10] V. Golapchandra Sarkar's *Hindu Law*, 7th Ed. (1936) pp. 730-731.

[11] *Sri Balusu Gurulingaswami* v. *Sri Balusu Remalatishmamma*. See below, n. 14.

[12] *Pr. N. Sm. Chockalingam Chettiar* v. *Official Assignee of Madras* (1942). L.R. 69 I.A. 157, 167. The meaning of the text might perhaps have been disputed, and reference made to other authorities, e.g. Viramitrodaya and Mayukha (Mandlik pp. 111-3).

[13] The references are here given to the reports and the appellants' names. *Bhugwandeen* 1867, 11 M.I.A. 487; *Collector of Madura* 1868, 12 M.I.A. 397; *Moniram* 1880, L.R. 7 I.A. 115; *Sri Balusu Gurulingaswami* 1899, L.R. 26, I.A. 113; *Bhagwan Singh* 1898, L.R. 26,

Continued on page 6

writers with *Apararka*, whose " authority is acknowledged by the expositors of the Benares school "; *Balam Bhatta*, " one of the best known commentators on the Mitakshara," " the learned Benares lady "; *Smriti Chandrika* of *Devanda Bhatta*—" it seems, to say the least, doubtful whether an enunciation in the Smriti Chandrika can be safely applied except perhaps by way of analogy to explain a dubious or indeterminate phrase or term in the Mitakshara." The *Subodini* of *Vivesvara Bhatta* " stands on a different footing (from the Smriti Chandrika); it no doubt professes to be a commentary on the Mitakshara but it is equally clear that in several instances it diverges from the acknowledged interpretation of its doctrines "; " their Lordships do not feel disposed to attach any canonical authority to the rule of the Subodini." The *Dattaka Mimamsa* of *Nanda Pandita* —a " standard treatise " and " an esteemed writer "; the *Viramitrodaya* of *Mitra Misra*, " a commentary on the Mitakshara the value and importance of which have been repeatedly recognized by the Board." *Vivada Chintamoni*, stated by Dawson Miller C.J. to be " an authority which is binding upon those who are governed by the Mithila school "; *Varadaraja*, " whose authority is said to be great in Southern India "; *Vyavahara Mayukha* of *Nilkantha Bhatta*, " a work of high and generally received authority not only in Gujerat but in Bombay and the Dekhan ": " in the presidency of Bombay the dominating commentary is the Mayukha which is a supplemental commentary to the Mitakshara." The *Dattaka Chandrika* is recognized as authoritative in Bengal and Southern India, notwithstanding that it gained this position owing to an erroneous notion that its author was Devanda Bhatta who wrote the Smitri Chandrika and notwithstanding a story that it was a forgery by Colebrooke's pandit (*circ.* 1800).

Some Main Titles of the Law.

(a) Adoption.—The differing natures of the Sanskrit authorities, the existence of schools of Hindu law, and the high place always reserved for custom have rendered the ascertainment of the law, as regards many of its doctrines, a delicate and difficult matter. Not the methods only, but also the results must be appraised if we are to form a useful estimate of the success of the Courts in administering the Hindu law, and we must take account of the tendency of the decisions to be fluctuating or consistent, to keep close to Hindu thought and feeling while accepting modern developments. For this purpose we may take a look at one or two important topics and ask how the Hindu law has fared at the hands of the Courts in such matters as adoption, wills, inheritance by women, the son's liability for his father's debt, joint property and impartible estates.

" The law of adoption," said W. H. Macnaghten in 1829,[14] " is deserving of the most serious and attentive consideration, as there is perhaps no topic of Hindu jurisprudence more surrounded by doubts and difficulties." We have seen these difficulties as they presented themselves in 1899 to Lord Hobhouse and his colleagues, but Macnaghten's words are worth recalling, since in retrospect the decisions of the last hundred years on this title of the law have been less marked by clearness and consistency than on any other. A bird's-eye view of the case-law discloses indeed a staggering and uncertain course, and the decisions cannot be said yet to have arrived at a clear and settled result. It was early decided, as we have seen, that—apart from special custom and as a matter of the general Hindu law—the widow's power to adopt a son to her deceased husband was dependent on different conditions in different parts of India—different " schools " of Hindu law having grown up. This has produced no great difficulty in Bengal and Agra, where express authority from the husband is required, or in Mithila, where the widow cannot adopt at all. But in Madras the law as to her powers

I.A. 153; *Buddha Singh* 1915, L.R.42, I.A. 208; *Girja Bai* 1916, L.R.43, I.A. 151; *Balwant Rao* 1920, L.R. 47, I.A. 218; *Perrasu* 1920, L.R. 48, I.A. 280; *Sourendra Mohum Sinha* 1924, 52 I.A. 418.

[14] Hindu Law: Preliminary Remarks.

was long in debate, the requirement of " consent of the sapindas " accepted in the Madura case (1868) already cited having been variously interpreted: different considerations arose according as the husband died joint or separate. In Bombay the consent of the sapindas is not required when the husband died separate, but on the question whether consent of his coparceners was necessary when he had died joint and undivided, the conflict of authority and unsettlement of accepted doctrine has exceeded all reasonable limits. In the end such consent was in 1932 unambiguously held to be unnecessary, and the doctrine laid down to the contrary by a Full Bench in 1879 was finally overruled, though in 1925 it had been held by another Full Bench to be good law. Certainly a remarkable " current of decisions."[15] Again, on the question whether the widow's power of adoption can be exercised so as to divest any estate inherited by another person, a new course was taken in 1933[16] which has fundamentally altered the principles previously accepted and removed restrictions previously imposed to the widow's right to cause a change in the ownership of property inherited. The ultimate decision in these matters may well be preferable to the earlier views: it is only reasonable to presume that it is; the tendency is to increase the rights of widows and to give more effect to religious principle; but it remains to be acknowledged that the British Indian Courts have made heavy weather of the subject of adoption, and that even to-day the law is stricter than the accepted practice as regards persons who may be taken in adoption by the twice born classes. The very moderate success of the Courts in dealing with adoption is the more remarkable that the importance of this title has grown in modern times, so that in Maine's words, " the law of adoption as at present administered is a purely modern development from a very few old texts."[17] " The whole Sanskrit law of adoption is evolved from two texts and a metaphor," he says elsewhere,[18] referring to a passage quoted from Saunaka that the person adopted must be " the reflection of a son " and to the texts of Manu and Vasishtha. It may perhaps be suggested that fundamentally adoption is a legal fiction—like other members of its class a good servant but a bad master. In view of its direct connection with religious beliefs the Courts have found special difficulty in keeping control of the fiction, in giving to it the scope which Hindu practice and opinion requires, without carrying it to absurd or inconvenient lengths, e.g. as regards the devesting of estates. Thus in the leading case[19] (in 1866) Lord Kingsdown's judgment appeared to fail to appreciate that the religious services to the ancestor are enjoined by the Shastras to be repeated at certain intervals; and that the spiritual purposes of a son are not exhausted by one who, though he attains maturity, dies without issue.[20] On the other hand, the religious necessity of adoption has been much exaggerated, as may be seen from the learned note which Mandlik added as Section II of Appendix IV to his translation of the Mayukha and of the Yajnavalkya smriti.[21] It may be instructive to quote from a judgment of the Privy Council delivered by Sir James Colvile in 1876:—

" It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation for the law of adoption; and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possesion—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to

[15] Cf. *Ramji* v. *Ghamau* (1879). I.L.R. 6, Bom 498. *Yadao* v. *Namdeo* (1921), 48 I.A. 513. *Iswar Dadu* v. *Gajabai* (1925), I.L.R. 50, Bom 468. *Bhimabai's case* (1933), L.R. 60 I.A. 25. *Appa Trimbak* v. *Waman* (1941), L.R. 69 I.A., 64.

[16] *Amarendra's case* (1933), 60 I.A. 242.

[17] *Hndu Law and Usage*, 6th Ed. (1906), p. 127, s. 103.

[18] s. 107, cf. p. 133 *ibid.*

[19] *Bhobun Moyee* v. *Ram Kishore* (1866), 10 M.I.A. 279.

[20] Golapchandra Sarkar's *Hindu Law*, 7th Ed. (1936), p. 216.

[21] V. N. Mandlik. Bombay (1880).

exert over women possessed of, or capable of exercising dominion over property. It seems therefore to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it." [22]

(b) **Wills.**—The Hindu will is a subject upon which the Courts have innovated upon the Hindu law and may perhaps fairly claim to have promoted a genuine development, though at first the new departure was regarded with strong disfavour by notable British jurists, such as Strange and Francis Ellis. The latter was a Madras civilian of great knowledge and reputation who died in 1819. His opinion was much valued by Strange, who included observations by him as well as by Colebrooke in the second volume of his " Elements " (1825). The view of Ellis about Hindu wills can be seen in his comment on the pandit's answer in a case of 1810 to the question: " If a man should make his will and deliver it to the person appointed by it to succeed to his estate, but the will be contrary to the dispositions which the law would make, which takes effect, the will or Dharma Sastra?" The pandit answered: " Be it will or any other instrument, if contrary to Dharma Sastra, it cannot be held good." Ellis remarks: " Most undoubtedly it cannot. What then is the will of a Hindu? If the distribution of property made by it be contrary to the provision of the Dharma Sastra, it is invalid: if in conformity with them it is unnecessary."[23] In a later note he amplifies his question: " What then becomes of the legality of admitting them to probate in the manner practised in the several Supreme Courts: a course that has always appeared to me incongruous?"[24]

Colebrooke took another view, and in the end his opinion was in principle accepted by the Judicial Committee and became the law of India.[25] He had become a member of the Sudder Dewani Adalat on its reconstitution in 1801 and president in 1805. From 1807-1812 he was a member of Lord Minto's Council, and he retired from India in 1814. In 1812 he wrote:—

" After much consideration of the question when it was agitated some years ago, it was here settled that a will (though this disposal of property be unknown to the Hindu law as was remarked by Sir William Jones) must nevertheless be held valid in the case of a Hindu; being in fact a gift made in contemplation of death, which the Hindu law, if it do not directly sanction, contains at least nothing to prohibit. Considering it then as a gift to take effect at a future time, determinable by a certain event (decease of the giver) I apprehend it must be governed and controlled by the general rules regarding gift."

Accordingly he thinks that in Bengal a member of an undivided family might under the Dayabhaga bequeath his own share of the joint property, but not in the other provinces under the Mitakshara, though separate property is another matter. The Cornwallis Code by Reg. IV of 1793 had directed Courts in Bengal to allow Hindu executors to take charge of the deceased person's estate, and this provision was repeated in Madras by Reg. III of 1802 s. 16, but neither in Bengal nor Madras does it seem that the right to make a will had been established as settled law in the district courts or the Sudder Dewani. However, it was well established in the Supreme Court at Calcutta by 1812. Colebrooke says: " I understand that in numerous instances wills of Hindus disposing of ancestral as well as acquired property, according to the testator's pleasure, have been allowed by the Supreme Court." Strange speaks in deprecatory tones of " the practice that has obtained among the Hindus at our Presidencies of indulging in the liberty of *wills* for which their language has not even a name." He regarded it as a " pernicious anomaly " and a " vicious practice."

" With respect to Madras, beginning as it did in the Mayor's Court, but too much reason exists for apprehending that it originated in motives not of the most honourable nature; being a device by means of which *native* property to a great amount became subject at the time and long after to European management."

[22] *Sri Raghunadha* v. *Sri Brozo Kishoro* (1876), L.R. 3 I.A. 154 at 193.
[23] Strange, *Elements of Hindu Law*, (1825), vol. II, p. 409.
[24] P. 413
[25] A statement of his opinion is to be found both in Strange's and in Francis Macnaghten's works.

He says that the practice of allowing Hindu wills, in Southern India, exists only within the limits of the King's Courts, and observes that if it is to be accepted " the difficulty will be to define it, to declare the extent of the obligation and to settle by what law the details of such power are to be governed."

The greater individualism of the Bengal school of law readily accounts for the greater readiness of the Courts in Bengal to admit the notion of a Hindu will, and for the desire of Bengalis of wealth or position to exercise the power which the British regarded as an elementary right in their own case. The Mayor's Courts—manned by laymen—had for many years been much occupied with the recovery of debts due to or from persons deceased, and had gone broadly on the principle that the person entitled to the assets must pay the debts. Since 1753 cases between Indians were not within their jurisdiction, but it did not follow that estates of Hindus might not have to be administered, at least in part.

There was a difficulty in granting probate or letters of administration in the case of Hindus since the testamentary jurisdiction of the Supreme Courts was, under the charters, part of the ecclesiastical jurisdiction. In the Supreme Court at Calcutta the practice from 1791 to 1832 was not to make such grants in the case of Hindus.[26] Omichand—that enterprising person—had made a will—*malik-nameh*—in 1758.[27] There were texts which seemed to say that what a man had promised for religious purposes must be given after his death, and which by treating promises as creating debts or otherwise may be viewed as containing the germ or rudiments of a will. When the Tagore case was before the Supreme Court in 1869 Norman J., recalling these texts, expressed the opinion " that a law of wills is part of the Hindu law and not a mere usage which has grown up of modern times borrowed from Western civilization "; and concluded that the extent and nature of the disposition which a Hindu testator is capable of making must be regulated by the rules to be found in or directly deduced from Hindu law. But the right to make a will, if established by decisions before 1812, was again queried in Bengal in 1831, when the Supreme Court consulted the Sudder Dewani on the powers of a Dayabhaga father, and it was settled[28] that he could give, sell or pledge ancestral property and that " without the consent of the sons he can by will prevent, alter or affect their succession to such property." This was founded on as concluding the matter in Bengal, by the Judicial Committee in 1856.[29] They said:—

" However this may be, the strictness of the ancient law has long since been relaxed and throughout Bengal a man who is the absolute owner of property may now dispose of it by will as he pleases, whether it be ancestral or not."

They treated it as settled law in Madras that a will of property not ancestral might be good, and held that as the testator then before the Court had no sons and had provided for the maintenance of his wife and daughters, he could leave ancestral property to religious and charitable uses. This ruling, though it affirmed the decision given in 1851 by the Sudder Dewani, was not in accordance with the ideas which had long prevailed in the Madras district and Sudder Courts. By Reg. V of 1829 it had been provided that Hindu wills should have no legal force whatever " except so far as their contents may be in conformity with the provisions of the Hindu law according to the authorities prevalent in the respective provinces under this Presidency." There was ground for thinking that the opinion of the pandits which the Judicial Committee had followed was based on a misunderstanding. Indeed, it had been disowned. The Sudder Dewani did not follow the Privy Council ruling, but the newly established High Court accepted it in 1863, saying:[30]

" Now that the legal right to make a will is settled there seems nothing in principle or

[26] Morton, reports pp. 1, 74, 75.
[27] Morley. *Digest*, v. II, 230. Montriou p. 341.
[28] *Juggomohon's case*, Morton 90.
[29] *Nagalutchmee* v. *Gopoo* (1856), 6 M.I.A. 308.
[30] *Vallinayagam* v. *Pachche*, 1 Mad., H.C. 326, 339.

reason opposed to the exercise of the power being allowed co-extensively . . . with the independent right of gift or other disposal by act *inter vivos* which . . . a native now possesses in Madras. To this extent the power of disposition can reasonably be considered to be in conformity with the respective proprietary rights of the possessor of property, and of heirs and coparceners as provided and secured by the provisions of Hindu law."

To-day it is far from axiomatic that whatever an absolute owner of separate property could do with it in his lifetime he should be allowed to effect by will. Even the law of England to-day requires him to take account of family claims which in his lifetime he could have defeated. The requirement that the Hindu's will must be in conformity with Hindu law was in the Tagore case[31] interpreted by saying that " even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred," and by the ruling that a testator cannot create an estate which is unknown to the Hindu law, e.g. an estate in tail male. In every system of law it is necessary to distinguish somehow between a mere promise and a gift, even if the gift be intended to take effect in the future. A bequest not intended to take effect immediately upon the death of the testator presents problems which are by no means completely analogous, especially if the bequest be also conditional. That the Hindu will has been freed from pointless and unnecessary restrictions is largely due to a judgment delivered by Lord Justice Knight Bruce in 1862[32] recognizing as valid what in England were called " executory bequests " as distinct from " remainders." After saying that the testamentary power of Hindus must be considered as completely established, the judgment continues:

" This being so, we are to consider whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of the Hindu law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen if at all immediately on the close of a life in being. Their Lordships think that there is not."

The most important application of the Hindu law as regards the property which a Hindu will can transfer is, of course, the rule which prevents it taking effect upon an undivided coparcenary interest of the testator, since the other coparcener's title by survivorship takes effect. As regards the persons who can take, the Tagore case laid it down as the rule of Hindu law, that the taker must be a person in existence at the testator's death, but it is not clear that this was an absolute requirement of the Hindu law of gift, at least under the Mitakshara. The requirement has been modified or lightened by legislation which since 1929 has put gifts and bequests on the same footing and which provides a rule against perpetuity on the English model. In this matter, while the admission of the Hindu will into the law of India was the work of the Courts, the legislature has in the end lent its aid to adapt and confirm the principles upon which the Courts proceeded. But long before the legislation of 1914 and 1916 which made possible gifts and bequests to an unborn person, the legislature had interposed, by the Hindu Wills Act of 1870, as regards wills of Hindus made in, or relating to immovables within, the Presidency towns or made in the province of Bengal. It had laid down the requirements of writing signature and attestation for such wills—requirements not extended to India generally till 1927—and made probate procedure necessary in respect of them and effective to vest the estate of the deceased in the executor. The position of the Hindu will under the present Indian Succession Act of 1925 need not here be discussed.

(c) **Women's Property.**—The principles on which the Hindu law recognizes and regulates the rights of women to inherit and enjoy property have presented to the Courts some critical and formidable problems. After giving full effect to

[31] 1872. L.R. I.A. (Supp.) 47.

[32] *Soorjemoney's case* (1862), 3 M.I.A. 123 at p. 143.

differences which arise between one part of India and another by reason that the authority of different Commentators has prevailed in different parts, the best that could be made of the Sanskrit authorities was both unconvincing as an interpretation, and difficult to justify under modern conditions as a practical rule.

It will be enough to consider here the main matter—the right of women to inherit property from males: and to put aside the special problems which centre round the term "stridhana"—a word employed in the Bengal school to signify certain special kinds of women's property (her separate property or *peculium*, as it were), but employed with a more general meaning by the Mitakshara. So far as regards her right to inherit from males, the results arrived at by the Courts, after unravelling the tangled skein of the authorities, have been so profoundly altered by a recent Act of the legislature as to make their labour appear now to be a closed chapter of past history. This Act is called the Hindu Women's Rights to Property Act 1937 (Act XVIII of 1937 as amended by Act XI of 1938).

It has been generally thought, both in modern and mediæval times, and it is probably true, that the inability of women to hold property was a feature of the early stages of Hindu society.

An early Smriti writer (Baudhayana, 650 B.C.), the reputed founder of one of the schools of the Black Yajurveda in a text which has long attracted attention, quoted a passage of his Veda saying:

"A woman is not entitled to inherit; for thus says the Veda: females and persons deficient in an organ of sense (or a member) are deemed incompetent to inherit."[33]

This passage of the Veda, according to many authorities old and new, means nothing of the sort, the word "daya," which means "heritage," meaning also "oblation"; and the passage according to these scholars may be translated thus: "Women are considered disqualified to drink the Soma juice and receive no portion of it at the sacrifice."[34] This reference to the Veda is treated by Dr. Jolly as on a par with others. He tells us:—

"Very few of these texts from the Veda have a bearing on civil law; and those texts which are actually quoted in support of some legal rule have generally been given their significance by means of an artificial method of interpretation."

He gives this example from Baudhayana and others from Vasishtha (400 B.C.) and Apastamba (500 B.C.) showing that "the texts of the Veda, far from exercising a pressure on the Smriti writers and preventing them from recording freely the usages of their own period, were by a little dextrous wrangling made by them to fit in with, and capable of being adduced in corroboration of, their own theories. . . ."[35]

The principle which has governed the Courts is that the law is to be collected from the Commentaries and Digests and not by putting a new construction on the teaching of the Smritis, and while it is in a sense unfortunate that the text of Baudhayana should have been taken at its face value by the Dayabhaga (A.D. 1200-1400) and other Commentaries, this fact affords (on accepted judicial principles) no valid or even serious reason for rejecting the teaching or ignoring the practice and opinion which the Commentaries represent. However this may be—and for the present purpose it matters little—in the Code of Yajnavalkya (A.D. 350)—the work upon which the Mitakshara (A.D. 1150) is a commentary—the right of women to inherit was established to a very considerable extent. The order of succession to the estate of a Hindu dying without a son, son's son, or son's son's son is thus laid down:—"The wife, daughters, both parents, brothers and likewise their sons, gotrajas (gentiles), bandhus (cognates), a pupil and a fellow student."[36] Moreover it would not appear that Yajnavalkya had accepted any doctrine that a woman's right in property inherited from her husband or father

[33] Prasna II k.2.
[34] West and Bühler, *Hindu Law*. Book I, 4th ed. (1919). p. 117-8.
[35] Jolly, *History of Hindu Law* (1885). Tagore Lecture (1883), p. 40.
[36] Yaj. II 135.

was only a limited estate. The Mitakshara itself does not quote the text from Baudhayana and does not appear to proceed on any general incapacity of women to inherit, but in the Dayabhaga as also in certain sub-commentaries of the Mitakshara school, Baudhayana's text is vouched for the conclusion that no female can inherit to a male unless she is expressly mentioned as an heir in the texts. Those covered by the exception are taken to be (1) widows, (2) daughter, (3) mother, (4) father's mother and (5) father's father's mother. This was in effect the law of Bengal and Benares until recently. The Bombay and Madras schools of law recognized no such general presumption against women's rights, and following the well-worn text of Manu—" to the nearest Sapinda the inheritance next belongs "—made room for a number of other female relations—including the sister, son's daughter, daughter's daughter and others. The Bombay school went even further and recognized as heirs the widows of gotraja sapindas. The legislature in 1929 interposed, not indeed to effect uniformity throughout India, nor to take away any rights of inheritance, but to provide that in the case of all persons governed by the Mitakshara, a son's daughter, daughter's daughter, sister and sister's son should rank in that order next after a father's father. But this new provision, like the list of female heirs which it amended, applied under the Mitakshara to such property only as was the separate property of the male propositus. Property which was his in the sense that he was a member of a joint Hindu family which owned it passed on his death by survivorship to his coparceners, who were necessarily males. The Mitakshara certainly gave no reasoned defence of this feature of the system, but it left no doubt that the right of a woman to inherit was limited to the separate property. The Mitakshara itself did not say that the right of a woman was a right in all cases to a limited estate, nor that on a widow's death her husband's heirs succeeded her and not her own, and the meaning of Vijnaneswara in this respect has been much debated both among Sanskritists and in the law courts. But these two propositions have been established by the decisions as correct law under the Mitakshara.[37] In Bombay, indeed, under the Mayukha, property inherited by a woman is treated as her *stridhana* in the narrow sense, and is inherited by her own heirs save where she herself inherits it as a widow, mother or otherwise as a woman who entered the gotra (family) of the propositus by marriage.

The Dayabhaga, many centuries after the Mitakshara, introduced as law of Bengal the conception of a Hindu family in which the son took no share in ancestral property at his birth, but only by inheritance from his father; and in which the father's power of disposal during his lifetime was complete. Under both systems, upon a partition between sons, the share of a son had to be set aside for the mother; and under the Bengal family system the widow in the absence of sons would succeed her husband in the ownership of his ancestral as well as of his other property. But the Dayabhaga accompanied this advantage with a general restriction as regards the estate which was taken by a woman inheriting from a male: that it was a limited estate—not indeed strictly a life estate merely, but one which did not include the power to alienate the property except for necessity. This restriction has been applied by the Courts to cases governed by the Mitakshara. The right of the husband's heirs to succeed after the female was safeguarded in this way under both systems.

Summary of the New Law.

Such, very roughly, was the system which the legislature in 1937 amended or revolutionized. Under both systems the widow is now to be entitled to the same share as a son; she is no longer to take by inheritance only in the absence of sons. The doctrine of survivorship, fundamental hitherto to the Mitakshara joint family, is modified by a provision that on the death of her husband she shall

[37] The cases are referred to in *Sheo Shankar Lal* v. *Debi Sahai* (1903), L.R. 30 I.A. 202, 208.

have the same interest in the joint family property as he himself had. In both systems the interest taken by her is to be the limited interest known as a Hindu woman's estate, but she is to have a right to claim partition. The Act does not otherwise explain what is to happen at the widow's death and no attempt to anticipate its working can be made here. But—putting aside any disputable questions of policy—we have here again a subject matter upon which the results of a long course of judicial interpretation and development are rendered more uniform, and are modernized, improved and simplified by the action of a legislature which can make good its claim to represent Hindu opinion. There are limits set to what judicial methods can do with inconsistent and intractable material, and to complain of the Sanskrit authorities for these qualities would be to complain of Indian life for being varied and progressive.

(d) **Coparceners' Rights are not absolute.**—That the legislature in 1929 and 1937 was careful while conferring new rights upon certain classes of women to give them the right of a limited owner retaining the characteristics of a Hindu woman's estate, emphasizes the truth that Mr. Maine put by saying that the Hindu law measures estates not by duration but by use, and that, as regards right of disposal, restriction is the rule and absolute power the exception. " Even the male head of the family was hemmed in by limitations. These were gradually reduced in their application, when separate and self-acquired property was introduced, and at last disappeared entirely under the Bengal system."[38]

As regards joint family property under the Mitakshara, it is most usefully pointed out by Sir Francis Oldfield that the nineteenth century has seen the growth of the right on the part of a particular coparcener to deal with his own interest while it remains a mere right in joint property. That it could be realized by execution sale at the hands of a creditor was established in Madras in 1855 and in Bengal and Bombay in 1872. That the coparcener can alienate for value at his own hand and without consent of the other coparceners was decided in Madras in 1862 and in Bombay in 1873, but in other provinces this right is not yet conceded to him save for cases of legal necessity or for payment of a father's antecedent debts.[39] The doctrine that each coparcener has an interest in the whole is still not without effect, though it has yielded ground.

(e) **Impartible Estates.**—Though impartibility of property belonging to a raj is not unknown to the Hindu law, the subject of impartible estates is not one strictly speaking of Hindu law but a question of the extent and true effect of customs which impair or invade the general Hindu law of the texts.

On this topic it is generally recognized that by the decision of the Judicial Committee in *Sartaj Kuari's* case[40] the law was deflected from its proper course. It was there held that an impartible estate is not coparcenary property and that the present holder has absolute power of disposition so that he can sell it to a stranger as he may think fit. Subsequent cases have made plain that for purposes of succession such an estate may be either separate property of the last holder or joint family property. In the latter case it goes by the custom of single heir succession, to that one, among those who are joint in estate with the last holder, who is pointed out by the particular custom, e.g. to the eldest male in the male line when the custom is one of lineal male primogeniture.

But the absolute right of alienation given by that decision to the present holder merely because other male members of the joint family have no right to call for a partition is the result of over-refined logic applied to the Mitakshara—itself an ancient, subtle and disputatious commentary. The right to alienate having been declared by the highest tribunal and titles acquired on the strength of the decision to important estates, the decision was not one of the class

[38] *Hindu Law* 6th ed. (1900), p. 796 s. 607.
[39] *Cambridge History of India*, v. VI, ch. XXI.
[40] 1888 L.R. 15 I.A. 51.

which subsequent decisions can overrule. But in Madras the provincial legislature intervened in 1904[41] to declare certain particular estates to be impartible, but to negative the right of the proprietor of such an estate to alienate or bind it by his debts beyond his lifetime, save under circumstances which would justify the manager of an ordinary Hindu family in dealing with the interest of the other members without their consent. It has been established that when the estate is held as ancestral or family property, the sons and brothers of the holder are entitled to maintenance by a custom judicially recognized, but beyond this relationship a right to maintenance must be proved as a particular custom. The Privy Council have not accepted the view that the interest of junior members of the family is represented by a right to maintenance, and require such a right to be proved by evidence of custom.

(f) **Father's Debts.**—The last topic upon which the views taken by the Courts will be here noticed is that of the son's liability for the father's debts. This liability not seldom makes sad havoc of the rights which arise at birth to a son under the Mitakshara, and there can be no doubt that it has to-day a form and effect different from the original. The pious obligation applies to " sons " in the sense of sons, sons' sons, and sons' sons' sons. It applies only if they are joint with their father. The son is not liable if the debt is incurred by the father after partition. The liability does not exist if the father's debt has been tainted with immorality (avyavaharika). But the liability is not a personal one: it is limited the " son's " interest in the joint family property. In *Sahu Ram's* case[42] the Judicial Committee had held in 1917 that the liability of the " son " did not arise in the father's lifetime, but they were induced to reconsider and retract this doctrine in 1924.[43] The original teaching of the Hindu writers seems to have made the son liable only after the father's death, but to have made him liable to the extent of his whole property and not only to the extent of his interest in the joint family property.

Broad Conclusion.—The topics which we have taken to illustrate the effect of British Indian Courts and their methods upon the Hindu law are, in themselves, of considerable importance; and are not fairly comparable, it is hoped, to a dozen of bricks produced to show what a house is like. While they do not suffice to ground any ambitious generalizations, they do seem to show that the Courts have had to take very broad decisions upon fundamental matters of Hindu law. The nature, number and character of the authorities have left more matters of deep principle to the decision of the judges than accords with the limitations of a judicial method, or with the fact that the tribunals—those in particular of last resort—have been chiefly manned by judges who are Europeans. Ordinarily the existence of a clear rule, ascertainable by accepted methods which take the rule out of the sphere of a general or wide discretion, is the postulate of a sound judicial system. It can hardly be said of the Hindu law that during the last hundred years the tribunals have had the benefit of that *desideratum*. When considering whether nations can be expected to submit on all matters and without reserve to the decision of an international court, it has often been pointed out that the difficulty is, as regards some subject matters, to be sure that there are ascertainable and accepted principles from which the conclusions of the judges can and will be drawn. There may be some advantage in an arrangement that all parties will abide by the decision of certain judges, but a judicial decision means something more. The different dates and discrepant sentiments of ancient texts, the disputes and distinctions of the various Commentators, the allowance to be made for local variations in the general law as well as for particular customs, these are factors which can be and have been dealt with in a cautious

[41] Madras Impartible Estates Act (Mad. Act II of 1904).
[42] 1917 L.R. 44 I.A. 126.
[43] *Brij Narain* v. *Mangla Prasad* (1924), L.R. 51 I.A. 129.

and judicial spirit, but not factors which afford a firm datum line of legal principle. Since the cardinal importance of the forms of action has disappeared from English law, the superior Courts in England have ranged with more freedom over the higher points of principle, but it may be doubted whether there is any real comparison between the conditions under which such problems are presented to them and the controversies which have given rise to decisions moulding prominent features of the Hindu law.

Golapchandra Sarkar, the learned Bengal Sastri, in his *Treatise on the Hindu Law,* holding that on some points the decisions have departed from the Sanskrit Commentaries, considered that too much weight has been given to the principle of *stare decisis* having regard to Indian conditions. Since the decisions of the Court do not become known to the people or the pandits who advise them, titles, he says, would not be so much or so often disturbed by a change in the current of authority; and since the judges of the courts of last resort cannot be well acquainted with the ideas of the people they are more exposed to the risk of mistake. The criticism is, however, somewhat unpractical. The number of High Courts in India ensures that every variety of opinion and source of information gets its chance. The Judicial Committee has never proclaimed its own infallibility: on grounds sufficiently clear importing injustice or mistake it can and will revise its opinion, as when in *Brij Narain* v.*Mangla Prasad,* 51 IA 129, it revised the case of *Sahu Ram,* L.R. 44 IA 126, and agreed that the son's liability for his father's debts could arise in the father's lifetime. It should be noticed perhaps that no great interval of time had elapsed since the earlier decision. As one judgment only is given in each case the difficulty is sometimes great in distinguishing which is essential to the decision—part of the *ratio decidendi*—and what is *obiter.* Though *stare decisis* is not a fetish it is in practice fundamental to the usefulness of courts of justice, and any other practice would be inconvenient in a very high degree. The Commentaries are not always impeccable in logic and consistency; merely because it is shown in the light of the latest research that the better view of the meaning of an ancient text is different from that adopted after much care and argument fifty or a hundred years ago—this is no ground for changing a rule of law which is not unjust or otherwise objectionable. It is however a very different matter if the Courts are found to be imposing practical restrictions which have not been accepted *de facto* and which are not warranted by the texts which are vouched for them.

The main points on which Sarkar thought the Courts to have departed from the true meaning of the texts are in substance these—that they have overestimated the father's rights under the Dayabhaga as against the son in ancestral property, that the position of women has been too unfavourably construed both under the Mitakshara and the Dayabhaga, that the order of succession under the Dayabhaga has been in some points changed; that in the Benares school the son's interest in ancestral property is made to bear the father's debt if not incurred for immoral purposes, and that the adopted son is entitled to all the rights of a legitimate son. These are certainly important subject matters, but the criticism that the accepted version of the effect of the Dayabhaga or Mitakshara does not completely coincide with the latest and most critical interpretation does not take account of the fact that the duty of the Courts was to ascertain the Hindu law as received. They have endeavoured to treat the Hindu law as a living thing and to remember that the rules of the ancient texts derived their sacred character originally from the notion that they expressed ancient custom. Thus the extent of the powers of a Dayabhaga father over ancestral property was, as we have seen, carefully checked by the Supreme and Sudder courts in 1831[44]—in the palmy days of the pandits, and Sarvadhikari in his well-known work[45] says that

[44] *Juggomohun Roy* v. *Sri. Neemoo Dossee.*
[45] *Hindu Law of Inheritance* (1882) p. 890-896.

" it seems to be strange that the texts of the Dayabhaga on this subject should even admit of doubt." He expresses no dissent from the finding of the Judicial Committee after reviewing the diversity of opinion among Benares pandits, that under the Mitakshara a widow inherited movables and immovables from her husband only for a limited estate.[46] Sarkar's point about adoption seems to be that an adopted son is given in our Courts the same rights as an *aurasa* or real legitimate son in every case, whereas the Commentaries make this conditional on his " being endowed with good qualities." The alterations made in the Dayabhaga's order of succession are said by Sarkar to consist in taking " the pinda theory" too strictly, with the result (which was favoured by Dwarkanath Mitter J. in *Guru Gobend Saha* v. *Aniond,* 13 W.R. (F.B.) (49) that details in the order laid down by Jimutavahana are ignored and certain cognates made to come before agnates of the same degree. Sarvadhikari seems to take a different view from other authorities on these points. It is said with historical truth, as we have seen, that the Courts have transformed the pious duty of a son to pay his father's debts into a present legal liability annexed to both the father's and the son's interests in the ancestral property if the father's debts were not contracted for illegal or immoral purposes.

These comparisons between the present law and the text of the Commentaries do not seem to amount to a grave indictment of the British Indian Courts. In coming to their conclusion they have been much influenced by the early pandits and the earliest English authorities—Colebrooke, Macnaghten and Strange—but they may claim to have been scrupulous as to the authority of the texts. They have doubtless fallen into error on occasion, e.g., they may be wrong in treating the Dattaka Chandrika as authentic or as having authority in Madras. While far too much has necessarily been left for the Courts to decide and while they have had to take their decisions without a sufficient basis of accepted or indubitable principles to rely upon, it must be remembered that the object of a Court of law is not antiquarian but practical. If on any point the Courts have rationalized, modernized or liberalized the rules of the texts this result has arisen naturally and gradually out of the circumstances of the individual case and has on the whole been without offence. An occasional growl from the learned Sanskritist is to be expected—as witness Mandlik's[47] objection to the ruling that a Brahmin's wealth escheats to the Crown like any other person's,[48] and Sarkar, though some of his points seem to be matters of opinion, can doubtless show that the modern interpretation of old texts is not always right. But it is not clear that in such cases the Hindus would prefer the more accurate interpretation as a rule of law: any more than they would be prepared to do without the right to make a will which was unknown to the Hindu law.

What is necessary now is that the law should be reviewed by a legislature which can claim to know where the shoe pinches and can be relied upon to look at modern needs and not to lose itself in ancient logomachy. Into these terms we may now translate what Maine said fifty years ago:

" What we really want is that well-informed natives of India should take a law book in their hands, and tell us frankly, under each head, how much of the written text is actually recognized and practised as the rule of everyday life." [49]

That the Indian Legislature is minded to give serious and sustained attention to this part of its responsibilities is a most encouraging feature of recent years. Fitzjames Stephen in his speech in Council (April 9, 1872) on the Contract Act, suggested that Hindus would not be averse from having their law of Inheritance codified in an Act: but in 1901 Ilbert could say with truth:

[46] *Ul Thakoor Deyher* v. *Rai Baluk Ram: Bhugwandeen Dhoobey* v. *Myna Baee* 11 Moo. I.A. 139, 487.

[47] Introd. p. ii.

[48] *Collector of Masulipatam* v. *Cavaly Venkata* (1861), 8 M.I.A. 500.

[49] *Hindu Law and Usage,* Third Edition (1883), Preface.

"Whether the time has yet come for making a new departure by attempting to codify native law is a question which most authorities would answer in the negative." [50]

But to-day work is already well begun upon a careful restatement of the Hindu law beginning with the "title" of Inheritance. This is all the more likely to be accomplished with success as it is recognized that it is not equally necessary or desirable in every branch of the law, and that in some branches of the law it will be more difficult than in others. Improvement, both in substance and in form, where improvement seems possible with general consent, is a practical aim which will give increasing hope of reasonableness and of uniformity. The only codification which can be expected to be simple and, at the same time, conformable to the general notions of Hindus and acceptable to the community as a whole must of necessity be the work of the legislature. To Mr. Justice Holmes, who did not "attach much importance to the codifying *furore* except in India," Sir Frederick Pollock in 1877 put the question: "Do you think codification a humbug in the sense that codified arrangement of the law is undesirable in itself or only that there is no advantage in doing it by legislative authority?"[51] Here, doubtless, is the essential question. In India there is every advantage in doing it by legislative authority and only the legislature can do what is required. In laying down and applying rules of Hindu life on very fundamental matters the tribunals have done a great work for the Hindu law but it has been to a great extent law-making and the legislature should revise it.

THE ISLE OF MAN

[*Contributed by* THE HON. R. D. FARRANT, *First Deemster*]

THE Isle of Man is an Ancient Kingdom. It has its own Constitution, its own Legislature, its own Court and judiciary, and its own laws. Subject to the Royal assent, and to the overriding jurisdiction of the Imperial Parliament, it has full and sovereign rights to enact new Legislation, and alter, amend, or repeal, existing statutes or common laws.

Whatever may have been the original status in Celtic times, the establishment of the Kingdom of Man and the Isles by the middle of the eleventh century—and may be a hundred years before—was completed and recognized by neighbouring countries, and by the King of Norway its Suzerain. The extent of the King of Man and the Isles' Dominions was stated to Henry II by the Bishop, as covering Man and all the Hebrides as far as and including Lewis. The title (still used) of that Bishop was Sodor and Man. Sodor is a corruption of Sudreyar or Southern Isles, including all the Hebrides, and as distinct from the Northern Isles of Orkney and Shetland which were under the rule of an Earl.

The Norse Kingdom lasted till 1266 when King Haco of Norway by the treaty of Perth handed over the suzerainty of Man, which became separated from the Isles, to the King of Scotland. During the wars between Edward I who took possession of Man as Lord Superior of Scotland, and the Scots Kings, the Isle of Man was claimed by England and Scotland, according to the vicissitudes of their warfare, and finally became settled in the hands of Henry IV. The Kingship of Man was conquered by Sir Wm. Montacute, first Lord of Salisbury, about 1335-1343, and was confirmed by grant from Edward III. Montacute's claim was based on his descent through the females from the Norse Kings of Man, the last male of whom was killed in battle with the Scots. Salisbury sold his royalties to Sir William Scope, Earl of Wiltshire, the transaction being recorded with a statement that "it is the law of that Island that whoever may be Lord thereof shall be called King to whom also appertains the right to be crowned with a golden crown." On Scope's execution, the

[50] *Legislative Methods and Forms*, by Sir Courtenay Ilbert (1901), p. 154.
[51] *Pollock-Holmes Letters* (1942), pp. 7, 21.

Island was forfeited to Henry IV who granted it to the Earl of Northumberland who himself forfeited it for his rising against the King. Finally in 1403 Henry granted it first for life, and subsequently in fee, to Sir John Stanley and his heirs, who under the later title of Earls of Derby held it, dropping the title of King and taking that of Lord, till 1735-1736 when it descended to the Duke of Atholl, who sold it in 1765 to the Crown of England, in whom the lordship is now vested by the Imperial Act of 5 George III, cap 26.

To sum up the legal position, Lord Hardewicke held (by admission of all parties) in *Sodor and Man* v. *Derby and ors* (1751) 2 Vesey p. 337, that Man was "not part of the Realm of England; it was parcel only of the Kings Crown of England; a distinct dominion now under the Kings grants and so ever since from long time past granted and held as a feudatory dominion of liege homage of the Kings of England; the laws of England therefore as such, extend not to it, neither the Common or Statute law unless expressly named, or some necessary consequence resulting from it" (and see *Davison* v. *Farmer* (1851) 6 Excheq. 242. *Exparte Brown* (1864) 5 B & S 280).

The feudatory homage last rendered by the Duke of Atholl to George IV was the presentation of two Falcons at his Coronation. This of course is now in abeyance but would presumably revive if the Crown ever made a fresh grant of the Lordship. Nothing is known of the internal constitution of the Island prior to the Norse invasion. Since that date i.e. some time in the 10th century a constitution based upon the Norwegian has been in continuous operation. This originally consisted of a King or Lord acting with the advice and consent of a body of judges and legislators chosen from the seventeen parishes into which the Island is divided. From an answer given by the Deemsters (Judges) and Keys (or chosen ones) to Sir John Stanley in A.D. 1417 it would appear that the number has been and should be 24—twelve or multiples of twelve being the sacred number in the Scandinavian law. And that these persons were drawn as to 16 from Man and 8 from the outisles (or Hebrides). As the Island was divided for judicial purposes into six Sheadings (sixth parts), with three (in one case 2) parishes in each, the representatives were grouped for each Sheading as they still are. There was probably no upper chamber in the modern sense, but certain officers have subsisted from time immemorial, such as the Controller and Clerk of the Rolls who kept the records and audited the accounts, the Receiver General (formerly the most important) who collected and accounted for the revenues and acted (it is to be supposed), as Chancellor of the Exchequer, the Lords Attorney (or Attorney General) the Water Bailiff (or Admiralty judge) and the Ecclesiastical officers, i.e. the Bishop and Vicars-General. These officers in attendance on the Lord or his Governor seem from a very early date to have become an upper chamber of the legislature, by whose advice and consent with that of the House of Keys legislation was enacted. There were two other peculiarities of the Manx Legislature. The two Deemsters one for the Northside, and the other for the Southside acted not only as the Judges in all cases of litigation at Common Law, but also acted with the Keys in making declarations of the Common Law and custom at and for a long time subsequent to the coming of the Stanleys. To this day the senior Deemster fufils the task of reading out the statutes (or a short summary of them) in English, followed by a spokesman in Manx, at the annual ceremony of the promulgation of the laws at the Tynwald Hill at St. Johns. No statute passed by the Insular Legislature became of force and effect unless and until it had been so promulgated, and this is still the law, unless the statute itself provides for an earlier date.

Interesting historical and legal questions arise as to the origin of this ceremony and the composition of the participating members. To this day the seventeen Vicars or Rectors and the Captains of the Parishes form part of the Court or Assembly, although they have not, so far as is known, ever formed

part of the Legislature. I discuss these Insular questions in my book "Man" now out of print, which I hope to republish, as part of a larger work dealing with the Kingdom of Man and the Isles.

The early documents bound up in the Statutes of the Isle of Man include a number of orders by the Lord, or his Governor and Council, declarations by the Deemsters and Keys, and by the Bishop and Convocation as to the spiritual laws of the Church, Clergy and Laymen. The Church Courts as elsewhere dealt with a large number of causes of litigation. The full title of laws as enacted by the advice and consent of the Governor, Deemsters and officers and the 24 Keys is not stated till about the end of the 16th century. The existence of the Keys as the law making and law declaring authority seems however to have always existed since the days of the Norse Kingdom and probably followed regularly the composition and procedure of the Icelandic constitution as described in the Sagas, with such differences as would be inherent in a monarchy and a Republic. Tynwald Hill has also been the customary place at which to proclaim the accession of a new King, a procedure still followed. In old days the King's heir might also be proclaimed in the life-time of his father as was the custom in Ireland under the system of Tanistry which formerly prevailed there.

It must be remembered that the system of open air Courts was universal amongst the Scandinavian nations in the Viking days and thereafter.

In Iceland the Island was divided for administrative purposes into four quarters each of which had its Ting or Court, and in Man the main division was two, Northside and Southside, each with its head Ting, at Cronk Urleigh for the Northside and Keeil Abban in Braddan for the Southside, with an occasional sitting in the Gateway of Castle Rushen the residence of the King. In Iceland there were also local Tings at which certain cases were taken, appeals lying to the quarter Court of the district. Eventually in 930 a fifth Court was established at Tingvalla, and became the Althing or Supreme Legislature and legal tribunal for the Island. One of their principal duties was to entertain cases when the verdicts of the quarter Courts, which were judged by 12, 24 or 36 judges, who acted as jurors now act, were challenged on various grounds. The establishment of the Ting at St. Johns in the Isle of Man appears also to have established it as the Supreme Court and it is significant that up to 60 or 70 years ago, the House of Keys sitting with one of the Deemsters was the supreme Court of appeal in jury cases, and that the proceeding was known as a Traverse, the Keys sitting to decide on points which were in form challenges to the action and procedure of the Sheading jury. The system of land tenure also has traces of the old Norse land tenure with its inalienability of land of quarterland of descent and its right of family redemption in 60 years or three generations. Till quite lately the Intacks or land enclosed from the Common did not become inalienable property until after 3 descents.

Originally there were a number of Baronies in the Island all of which were in the hands of various Ecclesiastical Corporations in Sir John Stanley's days and all of which, except that of the Bishop of Sodor and Man which still subsists, fell into the hands of the Lord by forfeiture for non rendering of homage, or at the Reformation.

Returning to the House of Keys, this body was up to the year of 1866 self elected. On a vacancy occurring through death or bankruptcy or forfeiture for treason or outlawry, the House elected two persons whose names were submitted to the Governor who chose one to be the new Key. In 1866 this process was swept away and a system of election by the people on the same lines as then prevailed in England was set up. This has been amended from time to time and is now the same as in England.

The reason for this was as follows: Up to the date of the vesting of the

lordship in the Crown in 1765, in accordance with the original practice of almost all countries which had a legislature, the Lord received all public revenues, and paid all the expenses of Government. He received all the customary rents paid by the proprietors of land, all customs, fines, forfeitures, escheats, wrecks, waifs and strays, mineral royalties and other payments and customs, out of which he maintained ports and harbours, public buildings and all salaries and other outgoings. The legislature had no revenues and did no administration except that they took over the Highways, and imposed rates and certain licence fees which were administered by a Committee of the legislature called the Highway Board. When the Crown succeeded to the Lordship the revenues were all collected by and the outgoings paid from the Imperial Treasury. Finally in 1866 an arrangement was made by which after providing for the expenses of Government, judiciary, police and the like—called the Reserved Services—the surplus revenues were placed at the disposal of the Insular legislature or Tynwald (as the Legislative Council and Keys sitting together are called) who could deal with these by resolution subject to the veto of the Governor and the approval of the Treasury. And that is substantially the legal position to-day as embodied in the Imperial Act Isle of Man Customs, etc., Act 1866 (29 & 30 Victoria, cap. 23). Since then a number of Committees of Tynwald have been set up by Statute:—the Harbour Board (created by the Imperial Act), The Highway Board (already existing), the Local Government Board, the Council of Education, the Mental Hospital and Assessment Board, the Fisheries Board, the Board of Agriculture, the Forestry Board, the National Health Insurance and Old Age Pensions Board, the War Pensions Board, and the Publicity Board. These bodies are mostly elected by Tynwald out of its own members and hold office for various periods, have their own offices and staffs and administer the grants of public money (including in some cases rates levied by them) voted by Tynwald.

The system of Government prevailing in the Island is then as follows:

The Lieut. Governor is the sole Minister. He is Chancellor of the Exchequer whose approval must be obtained to all money grants, he initiates Government legislation, he controls the Police and directs the Government Office through the Government Secretary, presides over sittings of the legislative Council and of the Tynwald Court, and acts generally under his Commission and instructions from the Home Secretary.

For a good many years efforts have been made by the House of Keys to introduce a larger measure of control by the legislature into the Government of the Island. From time to time amendments have been made. For instance the legislative Council, which consisted entirely of persons holding certain offices, was reformed so that the officials are reduced to four—the Bishop, the two Deemsters and the Attorney General—there are four members elected by the Keys, and two nominated by the Governor.

Originally the legislative Council was the Governor's Executive Council and it is still called together at intervals in that capacity. The actual executive work of Government however was carried on by the Governor himself with the assistance of the Government Secretary and his staff.

For the last 30/40 years the House of Keys have been pressing for the creation of a Committee or Council in which some of the peoples representatives should be included to act as a Committee of Government, and a proposal to that effect was submitted to a Commission appointed by the then Home Secretary, presided over by the late Lord McDonnell, which sat in the Island in 1908, but was by them turned down. The matter has been raised at intervals since, and some years ago an arrangement was made whereby the House of Keys appointed a standing Committee to whom the Governor undertook—and has since observed—that all important matters involving financial grants should be submitted for discussion before being brought before Tynwald. The

legislative Council in its executive capacity was to be similarly consulted. During this war the question became acute again, and a further arrangement was made by which the Governor nominated for approval by Tynwald a War Committee of seven members drawn from the Council and Keys who meet in private every week with the Governor, the Attorney General and the Government Secretary, to advise the Governor, who presides, on all matters of government and administration, and this has worked successfully. Latterly however the Keys petitioned the Home Secretary to make this Committee permanent and a deputation discussed it with Mr. Herbert Morrison in London and later in the Isle of Man, and the final decision is pending. It will be seen therefore that the working of the Manx Constitution is peculiar to itself, but the prosperity and success of the Island's economic life seems to indicate that it works well in local circumstances though theoretically not in accordance with the latest democratic opinion.

Great satisfaction was given to the Manx people by the visit this year of the King and Queen. His Majesty took part in and presided over the Annual ceremony of the promulgation of the laws at Tynwald Hill on July 5. This is the first time in history that an English Sovereign has done so, and it will be and remain a cherished incident in the history of this Ancient Constitution.

STATUTORY RIGHTS *IN REM* IN ENGLISH ADMIRALTY LAW

[*Contributed by* GRIFFITH PRICE, ESQ., M.A., LL.D.]

STATUTORY rights *in rem* are peculiar to English Admiralty law. Nothing similar is to be found in the law of the United States or, it is believed, in any foreign system. Such rights are given for claims for necessaries supplied to a vessel, for breach of the contract of affreightment, and for other claims for which, in American law, a maritime lien is granted. In one important respect statutory rights *in rem* resemble maritime liens in that they involve a proceeding against a *res*, as distinct from a person, the action being *in rem*, not *in personam*. Both in English and American law there exists a series of rights called maritime liens, or claims against a vessel[1], according to which the ship is personified, the action being directed against the vessel itself which is, so to speak, regarded as "the guilty thing." This special form of procedure is peculiar to the Admiralty law of England and the United States. It is employed to give effect to maritime liens in both these countries and, in England, to enforce statutory rights *in rem*. It is true that an action *in rem* is found in the Continental law of Europe, but in those Courts proceedings are never directed against a *res*, but always against a person.

Nevertheless, the personification of the vessel is a conception found also in European law. There are two standard examples of such personification in the latter, both indicating a method of limiting the shipowner's liability. In French law the owner of a vessel may rid himself of personal liability by abandoning the vessel and freight, or his *fortune de mer*, to his creditors. In Germany there is no abandonment, but wherever the owner's liability is limited to the vessel and freight, or his *fortune de mer*, the ship creditor or claimant has, generally speaking, a maritime lien on the ship and freight, and if the *res* is lost the owner is not liable to pay anything, unless he is in some way personally responsible. This device of the personification of the vessel appears to have its root in the early law of deodand and the *noxae datio* of Roman Law[2]. A curious instance of it existed in the old law prevailing in Hamburg

[1] The maritime *res* to which the liens attach may be the vessel, the cargo, the proceeds of their sale, and the freight.

[2] The theory held by the English Courts is that the procedure *in rem* arose out of the practice of arresting a vessel to compel appearance by the owner: see *The Dictator* [1892], P. 304.

whereby the owner of a dog which had bitten another person could free himself from all liability by handing over the dog to the injured party.

Personification of the vessel thus exists in European law, but it is only in English and American Admiralty law that the conception is employed in the form of a proceeding against the vessel itself as "the offending object." Thus in an action *in rem* in German law the implication is that the owner is only liable with the vessel and freight, the actual proceedings being *in personam*. In an Admiralty action in English or American law the proceedings are directed against the vessel, not against the owner, and the vessel itself is arrested in an action *in rem*. The two forms of personification found in Anglo-American and Continental law are, however, largely identical in their results. If your dog bites me it can make little difference whether I seize your dog (English and American form), or take proceedings against you and obtain your dog in compensation (Continental form). In Continental law, no less than in English and American law, maritime liens and mortgages, where the actions, according to the tradition of Roman law, are called *actions réelles*, are claims which attach to the thing itself, disregarding its owner or possessor. Such claims have a *droit de suite* on the vessel, and are, moreover, privileged claims with a right of preference. There are also other claims in Continental law which attach to the vessel and have a *droit de suite*, but these are not privileged. The action *in rem*, however, is peculiar to English and American law in that the jurisdiction of the Courts in such an action is based on the fact that the vessel is found and arrested in the national territorial waters, whereas this specific reason for the arrest of the vessel is not recognized in Continental law as giving jurisdiction to the Courts. Quite apart from any arrest or seizure there must be some other reason why the Court should be competent to deal with the claims, for instance, in French law, that the claimant is of French nationality, or, in French and Belgian law, that the owner of the ship has his domicile or an agency in the country.

It has been said that an action *in rem* in English and American law is a proceeding directed against the vessel itself. From this mode of proceeding *in rem* certain results should follow: (1) the owner's personal liability should not be an essential condition for the action to arise, (2) the claim against the vessel should follow it into the hands of a purchaser, regardless of notice, (3) claims against the vessel should have priority over all personal claims against the owner, and (4) the judgment in an action *in rem* should operate directly upon the status of the property and transfer an absolute title.

Taking the last mentioned first, it may be noted that both English and American law agree that a judgment *in rem* does transfer an absolute title to the property to which all other claims are subordinate. This is so in American law in the case of maritime liens, and applies in English law whether it is sought to enforce a maritime lien or a statutory right *in rem*.

As to the personal liability of the owner it is not possible to make any categorical statement. In regard to maritime liens the English Courts have adopted the procedural theory according to which the owner's personal liability is, as a rule, essential in order to constitute a maritime lien.[3] The American Courts have accepted the personification theory by which the ship is regarded as responsible, irrespective of the owner's liability.[4] Indeed, both in England and America the two theories are both applied in turn. In regard to statutory rights *in rem* the same rule, it is believed, must be applied as in the case of maritime liens, that is, the owner's personal liability is a condition of the enforcement of a statutory right *in rem*. Just as a maritime lien cannot attach to a Government vessel because a Sovereign would thereby be impleaded,[5] so also

[3] *The Dictator* [1892], P. 304; *The Castlegate* [1893], A.C. 38, 52.
[4] *Tucker* v. *Alexandroff* (1901), 183 U.S. 424.
[5] *The Tervaete* [1922] P. 259.

for the same reason there can be no statutory right to proceed *in rem* where, for example, personal injury has been caused by a State-owned vessel. In the case of necessaries, for which a statutory right *in rem* is given, it has been held that, in order to render the ship liable *in rem*, it is essential for the master to have authority to bind the owner.[6]

Both in English and American law a maritime lien follows the vessel into the hands of a *bona fide* purchaser for value, regardless of notice. This, of course, is the distinctive feature of the maritime lien, but it is interesting to note that the underlying reason is quite different in the two national systems. In the United States the maritime lien follows the vessel because it is "a right of property" in the ship,[7] and this seems logical enough having regard to the essential nature of a maritime lien. In England the reason for the *droit de suite* is hard to trace, but is apparently to be explained by the difficulty of otherwise enforcing any remedy in favour of an injured suitor.[8] The maritime lien in England, therefore, has its foundation in general considerations of justice and expediency. The statutory right *in rem*, however, diverges sharply from the maritime lien at this point, for it is of no avail against a *bona fide* purchaser for value.[9] It is thus a less valuable right than a maritime lien. To obtain a full understanding of the nature of the statutory right *in rem* and its relation to the maritime lien it is necessary to consider for a moment the historical origin of this particular feature of maritime law.

The exact nature of the jurisdiction possessed by the Admiralty Court in England before the enlarging statutes is uncertain. There appears to have been a limited jurisdiction *in personam*.[10] There was a jurisdiction in the case of maritime liens, and there seems also to have been a jurisdiction in some cases to entertain actions *in rem* not amounting to maritime liens, as, for example, pilotage claims. The jurisdiction of the High Court of Admiralty was extended by the Admiralty Court Acts of 1840 and 1861 to cover new claims, and the jurisdiction conferred was stated by s. 35 of the latter Act to be exercisable in proceedings *in rem* or in proceedings *in personam*. When the question arose whether the enlarged jurisdiction conferred a maritime lien it was held that, where the original jurisdiction included a maritime lien, the extended jurisdiction carried with it a similar lien, as where the jurisdiction was made to include claims for damage and salvage occurring *infra corpus comitatus*, or within the body of a county, having previously covered such claims only when arising on the high seas.[11] Where the Court possessed previous jurisdiction, but it could not be shown that a maritime lien existed, or where there was no previous jurisdiction at all, only a statutory right *in rem* was created. Thus, it may be that the Court possessed previous jurisdiction over claims for necessaries supplied on the high seas, but there was no maritime lien, hence where new jurisdiction was conferred, as in claims for necessaries supplied within the body of a county, only a statutory right *in rem* was given.[12] Where the jurisdiction pertained to what might be considered a new subject-matter like towage, no maritime lien, only a statutory right *in rem*, arose.[13] In the case of certain claims, such as damage to cargo, the right *in rem* accrues, under the statute, only upon the institution of the suit, and has accordingly

[6] *The Alexander* (1842), 1 W. Rob. 346; *The Tolla* [1921], P. 22.

[7] *The Young Mechanic* (1855), Fed. Cas. No. 18180 (C.C.Me.); *The Yankee Blade* (1860), 60 U.S. (19 How.) 82; *The Rupert City* (1914), 213 F. 263 (W.D. Wash.).

[8] *The Parlement Belge* (1880) 5 P.D. 197, 218, Brett L.J.; see *The Tervaete* (1922), P. 259, 275, per Atkin, L.J. In Continental law the *droit de suite* is regarded as a necessary consequence of the preferential character of the maritime lien.

[9] *The Heinrich Bjorn* (1885), 10 P.D. 44.

[10] See *Reg.* v. *Judge of City of London Court* [1892], 1 Q.B. 273.

[11] *The Sara* (1889), 14 App. Cas. 209, 216, per Lord Halsbury.

[12] *The Heinrich Bjorn* (1885), 10 P.D. 44; (1886) 11 App. Cas. 270.

[13] *Vide infra* on towage.

been held to be a mere right to proceed *in rem*, for a maritime lien accrues from the moment when the claim arises.[14]

We are now in a position to appreciate the difference between the maritime lien and the statutory right *in rem*. First it is worth while to recall the definition of a maritime lien given in the famous case of *The Bold Buccleugh*[15]: (1) a maritime lien travels with the thing into whosesoever possession it may come, (2) it is inchoate from the moment the claim attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached, and (3) in all cases where a proceeding *in rem* is the proper course there a maritime lien exists. This definition of a maritime lien is the standard one, and still holds good except that the *dictum* expressed in the last mentioned rule has not been followed in later decisions. In asserting that the maritime lien and the right to proceed *in rem* coincide Sir John Jervis, in giving his opinion in *The Bold Buccleugh*, appears to have been influenced by the decision of Story, J. in *The Nestor*.[16] Such is the American rule and if it applied also in English law there would be no series of statutory rights *in rem* distinct from maritime liens. It is clear, however, that English law distinguishes sharply between them.

The maritime lien, it has been stated, travels with the property, regardless of notice, into the hands of a new owner. What, in this connection, is the rule relating to the statutory right *in rem*? The judges in later cases, when interpreting the enlargement of the Admiralty jurisdiction by the Acts of 1840 and 1861, held that, except in regard to causes that previous to 1840 carried a maritime lien, the Acts, in extending the jurisdiction, merely granted a right to the Admiralty process, that is to say, the right to proceed against the property by arresting it in an action *in rem*. Whether a different decision could not have been arrived at may be questioned, and it would generally have simplified matters for the English Courts if they had held, as in *The Bold Buccleugh*, that wherever a proceeding *in rem* is available, there a maritime lien exists. But, as the law stands, a statutory right *in rem* is quite distinct from a maritime lien. The essence of a maritime lien is that it travels unconditionally with the property. The English Courts held that the Admiralty Court Acts in extending the jurisdiction could not, except in claims where a maritime lien previously existed, have intended to confer so important a right in the case of the various claims enumerated. The new right *in rem* conferred was not a maritime lien. It did not travel with the property, but was merely a right to arrest the property in an action *in rem*.[17]

Passing to the question of priorities before mentioned, we may note that both in English and American law the maritime lien bears the distinctive quality of a claim which ranks before other liens and claims. The underlying reasons in the two cases are, however, wholly different. In United States law the maritime lien ranks before all other claims from the very nature of the case. "All such claims, being derived through the owner and attaching only to his title and interest, are subordinate and subject to maritime liens; the latter attach to the vessel itself as an instrument of commerce which, in its interest, is personified and subjected to such liabilities, without regard to circumstances or questions of title or ownership."[18]

[14] *The Pieve Superiore* (1874), L.R. 5 P.C. 482.
[15] (1851), 7 Moo. P.C. 267.
[16] (1831), 1 Sumner 73.
[17] The statutory right *in rem* appears to resemble the *droit réel* of Continental law. Indeed, the *droit réel* does not at all imply what, in Continental law, is essential to a maritime lien, that is, a right of preference. Moreover, the *droit réel* or right *in rem* does not by itself entail the right to follow the vessel into the hands of third parties. This right must be expressly conceded by law, whereas the *droit de suite* is a corollary both of mortgages and maritme liens on the vessel.
[18] *The Guiding Star* (1883), 18 F. 263 (C.C. Ohio).

In England the maritime lien ranks before most other claims against the vessel, but for very different reasons. It takes precedence of a mortgage of the vessel because a mortgagee is, for the purpose of enforcing his security, an assignee of the owner's rights of property in the ship.[19] Apart from this, under English law a maritime lien has always been held by the Courts to have priority over possessory liens, statutory rights *in rem*, and ordinary claims because, notionally, the lien attaches to the vessel at the moment when, in collision cases, the damage is done or, in contractual and quasi-contractual cases (e.g., wages and salvage), when the liability is incurred. The maritime lien, as defined in *The Bold Buccleugh*, is " inchoate from the moment the claim attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached." Not so the statutory right *in rem*, for the Courts have decided that it only takes effect from the date of the actual arrest of the vessel. "The object of the statute is only to found a jurisdiction against the owner who is liable for the damage, and to give the security of the ship, the *res*, from the time of arrest.[20] The statutory right *in rem*, therefore, is not a lien in the ordinary sense, and it is not strictly correct to call it a statutory lien. Since it becomes effective only from the time of the arrest of the property it ranks after maritime liens, possessory liens, mortgages and any charges on the ship existing at the time of arrest, in accordance with maxim *qui prior est tempore, potior est jure*. It is comparatively rare that a claimant having a statutory right *in rem* finds himself in competition with an ordinary execution creditor. When this does occur their respective rights must depend upon the circumstances of the case. In *The James W. Elwell*[21] the sheriff, who had seized the vessel under a writ of *fi. fa.* in execution of a judgment, was given priority over a claimant for necessaries who had a statutory right *in rem*, but was postponed to the master who had a claim for wages and disbursements supported by a maritime lien, arising before the sheriff's seizure.

The existence of a statutory right *in rem* thus enables the claimant to avail himself of the machinery of the Admiralty Court, that is, to arrest the vessel in a proceeding *in rem* and thereby secure his claim. In the ordinary way this is a valuable remedy. It must be distinguished from the attachment of a vessel in action *in personam* such as exists in some countries. Thus by the law of Scotland a vessel may be arrested, whether the claim relates to the vessel or not, either (1) as a provisional measure to obtain security (*saisie conservatoire*) or (2) in order to found jurisdiction (*ad fundandam jurisdictionem*). In the United States, also, a vessel may be arrested in a suit *in personam*, and it is not necessary for the claim to have any connection with the vessel that is arrested. The only method of arresting a ship in England (excluding arrest by the sheriff after judgment) is by an Admiralty action *in rem*, either to give effect to a maritime lien or to enforce a statutory right *in rem*.[22] Moreover, the property arrested must be that in respect of which the claim arises, and not any other property belonging to the owner.[23] In an attachment *in personam* any property of the owner may be arrested, and the judgment in such an action does not convey an absolute title to the property, as in the case of a judgment given in favour of a claimant with a maritime lien or a statutory right *in rem*.

[19] The leading authority dealing with the position of a mortgagee is *The Two Ellens* (1871), L.R. 3 A. & E. 345.

[20] *The Pieve Superiore* (1874), L.R. 5 P.C. 482. But see *The Veritas* [1901], P. 304, 314, per Gorell Barnes, J.

[21] [1921], P. 351.

[22] But a ship may be " detained " under the Shipowners Negligence (Remedies) Act, 1905; see also s. 692 of the Merchant Shipping Act, 1894; and see s. 3 of the Merchant Shipping (Stevedores and Trimmers) Act, 1911.

[23] *The Beldis* [1936], P. 51; curiously almost the whole of the Appeal Judgment in *Beldis* is *obiter*.

Rights *in rem*, as distinct from maritime liens, are conferred by statute, and do not belong to the inherent jurisdiction of the Admiralty Court.[24] There is, however, a possible exception in pilotage, for which there has always been a right *in rem*, not by virtue of any express enactment, but under the inherent jurisdiction of the High Court of Admiralty.[25] Whether the right *in rem* for pilotage amounts to a maritime lien is uncertain, but it seems probable that it does.[26] The Admiralty Court also had inherent jurisdiction to arrest and detain a ship in an action of restraint on the part of a minority of co-owners.[27] This inherent jurisdiction of the Court is preserved under ss. 22 and 23 of the Judicature (Consolidation) Act, 1925.[28] Rights *in rem* belonging to the inherent jurisdiction would seem to resemble statutory rights *in rem* in their nature and incidents.

There are, therefore, three classes of rights *in rem*: maritime liens, statutory rights *in rem*, and rights *in rem* pertaining to the original jurisdiction. By English law[29] maritime liens are given for claims for bottomry, damage by collision, salvage, wages and disbursements. Statutory rights *in rem* are given for the following claims[30]:

(1) Claims relating to possession and ownership.

These may conveniently be classified in two groups: (*a*) Claims relating to possession and ownership *simpliciter*.[31] (*b*) Claims as between co-owners touching the ownership, possession, employment and earnings of any ship registered in England.[32]

In these cases the vessel may be arrested in an action *in rem*, but in regard to the characteristics that distinguish a statutory right *in rem* from a maritime lien, it seems that these can have no force in a cause of possession or ownership. In the nature of things, since it is an owner who seeks to enforce his claim, the rule laid down in the case of necessaries, that a statutory right *in rem* is not available against a purchaser, can have no application here and is irrelevant. Similarly, from the nature of the case, there can be no question of priorities in relation to other claims, where such arise, for the owner takes last quite apart from any considerations of ranking which belong specifically to the statutory right *in rem*.

(2) Claims relating to mortgages.[33]

The mortgagee may, where necessary, arrest the vessel in a proceeding *in rem*. However, the mortgagee is not in the same position as the ordinary claimant with a statutory right *in rem*. The priority of the mortgage is not determined by the fact that it is supported by a statutory right *in rem*, which accrues only upon the arrest of the vessel, for a mortgage is a charge on the ship by way of contract, and it has been decided that a registered mortgagee ranks before

[24] In some cases, such as master's wages and disbursements, maritime liens are conferred by statute.

[25] See *The Nelson* (1805), 6 C. Rob. 227.

[26] Originally pilotage claims were dealt with on the footing of seamen's wages, the pilot being treated as a seaman. In *The Ambatielos; The Cephalonia* [1923], P. 68, Hill, J. left open the question whether a claim for pilotage charges is supported by a maritime lien, but in that case all that it was necessary to show was that pilotage carried a right *in rem*, and it seems likely that, if the Board of Trade had been represented in the case, Hill, J. would have found that there was a maritme lien and not merely a right *in rem* for pilotage.

[27] *The Apollo* (1824), 1 Hagg. Ad. 306.

[28] The Act is a consolidating Act and does not confer Admiralty jurisdiction which was not already possessed by the Court either in its inherent or statutory form.

[29] The law of Scotland is the same: *Currie* v. *McKnight* [1897], A.C. 97.

[30] Now under ss. 22 and 33 of the Judicature (Consolidation) Act, 1925.

[31] Admiralty Court Act, 1840, s. 4.

[32] Admiralty Court Act, 1861, ss. 8 and 35.

[33] Admiralty Court Act, 1840, s. 3; Admiralty Court Act, 1861, ss. 11 and 35.

a claimant who has supplied necessaries to the ship[34], and, it seems, he has priority over a party claiming for damage to cargo.[35]

Where the vessel has been sold subject to an unsatisfied mortgage it would seem that a registered mortgagee may still exercise his statutory right *in rem*,[36] for the right to follow the vessel is a consequence both of the maritime lien and the mortgage. A mortgage thus resembles a maritime lien so far as it travels with the ship and is supported by a right to proceed *in rem*, but it is quite distinct because it springs from contract, whereas a maritime lien is given by law, and, further, it is postponed to the maritime lien in the matter of priorities. It is worth noticing, however, that in the United States preferred ship mortgages satisfying certain conditions are, by the Ship Mortgage Act, 1920,[37] given priority over all claims except costs and preferred maritime liens. Such mortgages thus constitute a species of maritime lien. Attention may also be drawn to the Italian *pegno navale* or mortgage. This latter differs from the English mortgage, for it does not import an assignment of the owner's rights of property, but is in the nature of a maritime lien charged upon the ship by special agreement, and not arising by operation of law. The *pegno*, however, ranks last among the claims supported by maritime liens which are given by Article 675 of the Italian Code of Commerce. The *pegno navale* may thus be regarded as an "express" lien upon the vessel. In the United States also, although a maritime lien cannot, in the strict sense of the word, be created by agreement, it has been held that an owner could contract to give the security of the vessel for necessaries supplied to her in a home port where no maritime lien was given by local statute. The American doctrine thus seems to have permitted the creation of an "express" lien by the owner, but only where there was a maritime necessity therefor and where a benefit was received by the vessel.[38]

(3) Claims for towage services.[39]

Towage, based on steam power, is a modern development. Before the enlargement of the jurisdiction by the Admiralty Court Act, 1840, towage claims were probably in the nature of salvage.[40] The jurisdiction conferred by the Act in the case of towage pertained to what was considered to be a new subject-matter, and was not a mere extension of an existing jurisdiction. Accordingly, when the question arose as to the extent of the remedy given for towage claims, although some decisions seemed to favour the existence of the lien, it was held that no maritime lien was conferred for towage.[41] Thus the remedy *in rem* given for towage services amounts only to a statutory right *in rem*, and is seen to be quite distinct from a maritime lien, for, on the analogy of what was laid down in the decisions relating to necessaries and damage to cargo, the right *in rem* for towage accrues only on the institution of the suit and does not travel with the vessel into the hands of a new owner.

[34] *The Two Ellens* (1872), L.R. 4 P.C. 161.
[35] *The Pieve Superiore* (1874), L.R 5 P.C. 482.
[36] See as to this *The Eastern Belle* (1875), 3 Asp. M.L.C. 19.
[37] 46 U.S. Code 911 ff.
[38] See Canfield, The Ship Mortgage Act of 1920, Mich. L.R., 1923, p. 15, and cases cited.
[39] Admiralty Court Act, 1840, s. 6.
[40] But see *The Isabella* (1838), 3 Hagg. Ad. 427, where the Court appears to have exercised a jurisdiction *in rem* in an action for modern towage. The claim in that case was for salvage, not towage. The service was a simple towage service performed without difficulty and was rewarded with a comparatively small award, but the award was nevertheless a salvage, not a towage, award. See *The Heinrich Bjorn* (1885), 10 P.D. 44; (1886), 11 App. Cas. 270; *Westrup* v. *Great Yarmouth Co.* (1889), 43 Ch. D. 241.
[41] *Westrup* v. *Great Yarmouth Co.* (1889), 43 Ch. D. 241; followed in *The Ambatielos; The Cephalonia* [1923], P. 68.

(4) Claims for necessaries and repairs.

Such claims include the following: (*a*) Claims for necessaries supplied to any foreign ship.[42] (*b*) Claims for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court that, at the time of the institution of the suit, no owner or part-owner of the ship is domiciled in England or Wales.[43] (*c*) Claims for the building, equipping or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the Court.[44]

In all these cases only a right *in rem*, not a maritime lien, is given. In regard to claims for necessaries supplied to a foreign ship, arising under s. 6 of the Admiralty Court Act, 1840, it was held that no maritime lien was given under the extended jurisdiction, since it could not be shown that prior to the statute a maritime lien had been recognized in any cases where necessaries had been supplied.[45] As to claims for necessaries and repairs, arising under ss. 4 and 5 of the Admiralty Court Act, 1861, it was held,[46] upon a principle of construction, that no maritime lien was given, for the Court has jurisdiction only where certain conditions prevail at the time of the institution of the suit, whereas a maritime lien accrues from the time when the claim arises.

While the Courts might have followed *The Bold Buccleugh* in holding that wherever a right *in rem* exists, a maritime lien is equally to be found, a difficulty might have been encountered in dealing with claims for necessaries and repairs arising under the Act of 1861, for the right *in rem* in these cases can only come into existence at the time of the arrest of the vessel, whereas it is well established that a maritime lien is inchoate from the moment when the claim arises, and when carried into effect by a proceeding *in rem* relates back to the time when it first attached. Moreover, the right *in rem* given for claims pertaining to possession and ownership can only amount to a statutory right *in rem*, for the remedy of a maritime lien seems inapplicable to such claims.[47] Again the right *in rem* for claims relating to a mortgage cannot be identified with a maritime lien, a mortgage being distinct from a maritime lien for reasons already stated. It seems, therefore, that the statutory right *in rem* must necessarily co-exist with the maritime lien in English law.

(5) Claims enforceable as if for necessaries.

Claims under this heading are those which, though not claims for necessaries, may be enforced in the same way as if necessaries had been supplied, for it is provided that any person having a claim in connection with the stowing or discharging of cargoes on board that ship, may institute proceedings in Admiralty for enforcing his claim as if it were a claim for necessaries supplied to the ship.[48]

(6) Claims for damage to cargo and breach of contract.[49]

These claims are, generally speaking, claims based upon the contract of affreightment, whether the form of the action is for breach of contract or for negligence or other tort. They may be detailed as follows: (*a*) Claims arising out of any agreement relating to the use or hire of a ship. (*b*) Claims relating to the carriage of goods in a ship. (*c*) Claims in tort in respect of goods carried

[42] Admiralty Court Act, 1840, s. 6.
[43] Admiralty Court Act, 1861, s. 5.
[44] Admiralty Court Act, 1861, s. 4.
[45] *The Heinrich Bjorn* (1885), 10 P.D. 44; (1886) 11 App. Cas. 270.
[46] *The Two Ellens* (1872), L.R. 4 P.C. 161.
[47] In the United States a part-owner of a vessel may obtain a maritime lien against his co-owners, but only where an advance is shown to have been made on the credit of the vessel and it is not unfair to the co-owners and other claimants to allow the lien: *The Puritan* (1919), 258 F. 271 (D. Mass.).
[48] Merchant Shipping (Stevedores and Trimmers) Act, 1911, s. 3.
[49] Admiralty Court Act, 1861, s. 6; Administration of Justice Act, 1920, s. 5.

in a ship, unless, when the proceedings were instituted, an owner or part-owner of the ship was domiciled in England.

The Court of Admiralty first obtained jurisdiction in relation to the carriage of goods under s. 6 of the Admiralty Court Act, 1861. In regard to claims for damage to cargo arising under the section it was held,[50] as in the case of necessaries, that no maritime lien was given, since the right to proceed in the Court depends on a condition prevailing at the time of the institution of the suit, whereas a maritime lien attaches at the moment when the damage is done. The jurisdiction over claims relating to cargo and contracts of affreightment was extended by the Administration of Justice Act, 1920, s. 5, and now rests upon s. 22 of the Judicature (Consolidation) Act, 1925.

(7) Claims for personal injury and loss of life.[51]

The right to bring an action *in rem* for personal injury was recognized[52] as a result of s. 7 of the Admiralty Court Act, 1861, which enacted that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship," and s. 35 of the same Act, by which the jurisdiction could be exercised in proceedings *in rem* or *in personam*. It seems, however, that the personal injury must be caused by the offending vessel as the "noxious instrument" or "active cause," that is, the damage must be done *by*, not merely *on* a ship.[53] No right *in rem* was allowed for injury causing loss of life, but as a result of s. 5 of the Maritime Conventions Act 1911 a right *in rem* is now conferred for damages both for loss of life and personal injury. Since, prior to the passing of the Admiralty Court Act, 1861, actions for personal injury were always *in personam*, it is probable that the statutory right given is only a right *in rem*, although it seems inequitable that damage done by a ship to a man's property should give rise to the superior right of a maritime lien.

(8) Claims for damage done by or received by a ship.

Before 1840 the Admiralty Court had jurisdiction over damage by collision on the high seas, and such jurisdiction included a maritime lien, although it was not till the decision in *The Bold Buccleugh*[54] that the existence of the lien was definitely established. By s. 6 of the Admiralty Court Act, 1840, the Court was given jurisdiction over all claims for damage "received by any ship or sea-going vessel," and to enforce payment thereof, "whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the damage was received." S. 7 of the Admiralty Court Act, 1861, gave jurisdiction "over any claim for damage done by any ship," while s. 35 provided that such jurisdiction might be exercised in proceedings *in rem* or *in personam*.

The jurisdiction conferred in the case of damage was extended in three ways: (1) to cover collisions occurring within the body of a county, (2) to include damage "received by" a ship, and (3) to include damage "done by" a ship. As to the first, it seems to be agreed that the extended jurisdiction carries with it a maritime lien so that, where a maritime lien would be given for a collision occurring on the high seas, a maritime lien would also be given for a similar collision taking place within the body of a county. The second and third of the above extensions are, of course, closely associated with the first. Damage on the high seas would almost entirely have signified a collision between two ships. Damage "received by" a ship under the enlarging statute would probably include cases where a ship was damaged by some obstruction

[50] *The Pieve Superiore* (1874), L.R. 5 P.C. 482.
[51] Admiralty Court Act, 1861, ss. 7 and 35; Maritime Conventions Act, 1911, s. 5.
[52] *The Sylph* (1867), L.R. 2 A. & E. 24.
[53] See *The Theta* [1894], P. 280, where the injury was sustained through falling down the hold of a vessel.
[54] (1851), 7 Moo. P.C. 267.

within a harbour. Where such an object, like a landing stage, was fixed, no maritime lien or right *in rem* could arise, so the jurisdiction given would be *in personam*. Where damage was "done by" a ship the extended jurisdiction was probably intended to include damage within a harbour to objects other than ships, such as a pier, or craft that would not be met with on the high seas, or perhaps damage done indirectly without contact.

The case of *The Minerva*[55] was decided within the meaning of the above sections. The point at issue in the case was whether an action *in rem* should be allowed to proceed or be dismissed for want of jurisdiction. The claim was for damage received by a vessel through the dropping of the vessel's elevator on to her deck from the Minerva. The Minerva was stationary and was not being "navigated" in any ordinary sense of the word, all her cargo having been discharged. However, it was held that damage done by "part of a ship" was "damage done by a ship" within the meaning of s. 22 of the Judicature (Consolidation) Act, 1925. It was also held that damage was "received by" a ship under the statute. Accordingly there was a right to proceed *in rem* by arresting the Minerva.

In order to determine whether the right *in rem* thus held to exist amounts to a maritime lien it is necessary to refer to the nature and characteristics of the maritime lien for damage. In *Currie* v. *McKnight*[56] it was said that " in order to establish the liability of the ship itself to the maritime lien claimed, some act of navigation of the ship itself should either mediately or immediately be the cause of the damage,"[57] and again that "the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manœuvre of the ship to which it attaches."[58] In *Currie* v. *McKnight* it was not necessary for the House of Lords to consider the effect of the Admiralty Court Acts, but the language employed is of great importance in considering the nature of a maritime lien and the circumstances in which it may attach. The term "navigation," it is true, may be taken to include "management," an expression wide enough to cover the handling of the ship and her equipment by the crew or other servants of the owner on board the ship, and the acts and omissions of the management staff ashore. However, the language of the House of Lords in *Currie* v. *McKnight* is quite explicit, and it seems, therefore, that in The Minerva no maritime lien, only a statutory right *in rem* can have attached. The decision is all the more difficult to understand because, although the distinction between a maritime lien and a right *in rem* is well understood in English law, from the very nature of the case it would seem that these coincide in damage by collision.

(9) Claims for wages earned under a special contract.

Where seamen's wages are earned under a special contract a statutory right *in rem* for their recovery exists as a result of ss. 10 and 35 of the Admiralty Court Act, 1861, now under ss. 22 and 33 of the Judicature (Consolidation) Act, 1925. Whether, as a result of these sections, wages earned under a special contract carry a maritime lien appears to be doubtful.[59] It is probable that originally the Admiralty Court had no jurisdiction over seamen's wages when earned under a special contract. Such contracts were brought within the jurisdiction by s. 10 of the Admiralty Court Act, 1861, and as this appears to have been a case of the extension of an already existing jurisdiction, it seems likely that such an extension carried with it a maritime lien. The doubt as to seamen's wages when earned under a special contract extends to master's wages,

[55] [1933], P. 224.
[56] [1897], A.C. 97.
[57] *Ibid.*, p. 101, per Lord Halsbury.
[58] *Ibid.*, p. 106, per Lord Watson.
[59] The question was left open by Lord Merrivale in *The British Trade* [1924], P. 104.

for they have by statute[60] the same remedies as seamen for the recovery of their wages.

Jurisdiction of the County Courts.

County Courts, possessing Admiralty jurisdiction, may, by s. 56 of the County Courts Act, 1934, decide claims for towage, necessaries, and damage to cargo and breach of contract.[61]

Apart from agreement between the parties, and save where in salvage actions the value of the salved property does not exceed £1,000, the jurisdiction of a County Court possessing Admiralty jurisdiction is limited to claims not exceeding £300. No proviso regarding domicil, as in the High Court, is attached to claims for damage to cargo and breach of contract. It is also enacted that claims for damage done by a ship include loss of life and personal injuries. In all these cases only a statutory right *in rem,* not a maritime lien, arises.

CANADIAN LAW OF CIVIL AVIATION

[*Contributed by* B. V. Richardson,[1] Esq., K.C., LL.B., (Winnipeg).]

"The law is confusing enough on the ground. When it leaves the earth it seems to seek the obscurity of the clouds rather than the clarity of the stars," 1937 *Law Journal,* p. 405. It might be an apt addition to say that the law of aviation presents an almost completely new set of problems to the lawyer. Their solution depends on law which is as yet in its early childhood. It may be difficult to arrive at true decisions merely by analogy to the old rules of common law. The doctrine that the ownership of land carries with it absolute rights in the air above it blocks the right to fly through the air. Where the burden of proof of negligence lies, following damage to person or property, the standard of care required in various circumstances and other such problems urgently require solution. Litigation arising from aviation is on the increase. New rules must be developed. As aviation grows in importance as a method of transport the necessary result of that advance must be a further development and crystallization of the law to be applied to it. Confusion will inevitably result unless the rulings laid down by the Courts in the various jurisdictions throughout the world achieve a fuller measure of uniformity than has heretofore been experienced.

Statute Law.—In 1919 the Dominion passed the Air Board Act (1919, c. 11), and on January 17, 1920, air regulations approved by the Governor in Council pursuant to statute were published in the *Canada Gazette.* Such regulations have been amended and added to from time to time. The statute established an Air Board. In 1922 the Dominion passed the National Defence Act, (1922, c. 34), under which the powers, duties and functions vested in the Air Board or by order or regulation made thereunder were in future to be administered, exercised and performed by, or under the direction of, the Minister of National Defence and in 1927 the Air Board Act became known as the Aeronautics Act, being an Act to authorize the control of aeronautics (1922, c. 34; R.S.C. 1927, c. 3). Certain provisions are found in the Aeronautics Act and not in the Air Board Act. In 1936 the Department of Transport Act (1936, c. 34, s. 5) transferred the control and supervision of the civil aviation branch of the

[60] M.S.A., 1894, s. 167; but s. 10 of the Admiralty Court Act, 1861, providing for the jurisdiction of the Court "over any claim by the master of a ship for wages earned by him on board the ship" makes no mention of special contracts, and is preserved under s. 22 of the Judicature (Consolidation) Act, 1925.

[61] Under the same section the County Courts have jurisdiction over damage by collision, salvage, wages and disbursements, claims for which carry a maritime lien.

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Department of National Defence from the Minister of National Defence to the Minister of Transport. By Order-in-Council P.C. 3076 of July 8, 1940, the Minister of Munition and Supply was substituted for the Minister of Transport.

Next came the Transport Act, 1938 (c. 53), being an Act to establish a Board of Transport Commissioners for Canada with authority in respect of transport by railways, ships and aircraft.

The Carriage by Air Act, 1939, being c. 12 of the Statutes of Canada, 1939 (First Session), was passed to give effect to the Warsaw Convention. This Act, however, does not come into force, in whole or in part, until proclaimed by the Governor in Council and there has been no such proclamation.

By Chapter 28, Statutes of Canada, 1944-45, the Aeronautics Act received substantial amendment and additions including the setting up of an additional Board to be known as the Air Transport Board and putting the provisions of the Aeronautics Act under the Minister of Transport or such other Minister as the Governor in Council may from time to time designate (The Minister of Reconstruction was designated under Order-in-Council P.C. 8986 of November 28, 1944), except in any matters relating to defence when the same came under the Minister of National Defence for Air.

Constitutional Aspects.—In 1930 certain questions were submitted by the Dominion Government to the Supreme Court of Canada and subsequently in 1931, on appeal, to the Privy Council respecting the question of the exclusive legislative sovereignty of the Dominion Parliament (see Reference *re* Aeronautics in Canada). (*Re* Aerial Navigation, *A.G. Can.* v. *A.G. Ont.*), (1932) 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108, (1931) 3 W.W.R. 625. The Judicial Committee was asked (1) whether the Parliament of Canada had exclusive legislative and executive authority for performing the obligations of Canada or of any province thereof under the Convention entitled " Convention relating to the regulations of aerial navigation," generally known as the Convention of Paris and hereinafter referred to; (2) legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a Province necessary or proper for performing the obligations of Canada or of any of the Provinces thereof under the Convention, is within the meaning of s. 132 of the B.N.A. Act (1867); (3) whether the Parliament of Canada had legislative authority to enact in whole or in part the provisions of s. 4 of the Aeronautics Act, i.e., purporting to empower the Minister to regulate and control aerial navigation over Canada and the territorial waters of Canada; (4) whether the Parliament of Canada had legislative authority to sanction the making and enforcing in whole or in part of the regulations contained in the Air Regulations. All questions were answered by the Privy Council in the affirmative.

As to the constitutional aspect it is obvious that some of the provisions of at least the Carriage by Air Act, 1939, cut across a field which had previously been exclusively dealt with by provincial laws. For instance, various provincial Acts deal with compensation to relatives of deceased persons where the circumstances disclose negligence on the part of some person or persons. This Dominion legislation will supersede those Acts on occasion. Nevertheless it would appear to be valid legislation within the rule laid down by the Judicial Committee of the Privy Council in the Aeronautics Reference, *supra,* as explained by the Committee in the Weekly Rest Reference (1937), 1 D.L.R. 673, A.C. 326, 1 W.W.R. 299. Since the Carriage by Air Act, 1939, was passed to carry out international obligations of a similar nature to those on which the Aeronautics Act was founded its validity can be justified on the same grounds, although the remarks of Lord Atkin may raise a doubt as to whether the Dominion has jurisdiction to make the provisions of the Warsaw Convention or the Rome Convention the law of Canada.

International Obligations.—The Aeronautics Act makes it the duty of the

Minister to take such action as may be necessary to secure, by international regulations or otherwise, the rights of His Majesty in respect to His Government of Canada in international air routes (s. 3 (*h*)). On October 22, 1929, the Dominion Government entered into an agreement with the United States of America providing that, subject to the conditions and limitations in the agreement contained and set in force, Canadian civil aircraft would be permitted to operate in the United States and in like manner civil aircraft of the United States would be permitted to operate in the Dominion of Canada. Since the passage of this, the first agreement, several additional agreements have been entered into between the Dominion and the United States of America pertaining to among other things air transport services, certificates of air worthiness for export, and pilots' licences (see Shawcross & Beaumont on *Air Law,* 1945 edition).

Prior to this agreement between Canada and the United States of America, namely, in 1922, Canada had become a party to the Convention of Paris. In accordance with art. 34 of the Convention, the International Commission for Air Navigation was instituted and has held many sessions and on March 1, 1935, modifications of the Convention previously approved came into effect. In general the Convention as modified lays down that the contracting parties recognize that every power has complete and exclusive sovereignty over the airspace above its territory and the territorial waters adjacent thereto. Each contracting State undertakes in time of peace to afford freedom of innocent passage over its territory to aircraft of the other contracting States, providing that the conditions laid down in the Convention are observed. The provisions of these Conventions and Treaties only become the law of Canada to the extent that they have been enacted by the Aeronautics Act or under authority of the Act have been by regulations made a part of the law of Canada; see *re Arrow River & Tributaries Slide & Boom Co.,* (1932) 2 D.L.R. 250, S.C.R. 495, 39 C.R.C.161. Canada has not become a party to the Rome Convention, 1933, which unifies certain rules relating to damage caused by aircraft to third parties on the surface nor as already indicated has she become a party to the Warsaw Convention.

Trespass and Nuisance in Air Space.—The question of proprietary rights in air space centres principally around the maxim *cujus est solum, ejus est usque* and *coelum et ad inferos.* With particular reference to aircraft, English authority appears to be more in favour of a strict interpretation of this doctrine than is American legal opinion. Clearly there can be a wrongful entry on land below the surface, as by mining, and in fact this kind of trespass is rather prominent in our modern books. See Pollock on *Torts,* 14th ed., p. 278-9; 46 *Canada Law Journal,* p. 730; Clerk & Lindsell on *Tort,* 8th Ed., p. 307; volume 64 *The Law Journal,* p. 6; Freeman on *Air & Aviation Law,* p. 86; Salmond on *Torts,* 8th ed., edited by Stallybrass, p. 212; Moller *Law of Civil Aviation,* p. 189.

It does not seem possible on the principles of the common law to assign any reason why an entry above the surface should not also be a trespass, unless indeed it can be said that the scope of possible trespass is limited by that of possible effective possession; which might be the most reasonable rule, and which is in effect embodied in the Air Navigation Act of 1920, which excludes any right of action for flight at a reasonable height or its ordinary incidents but where material damage or loss is caused by the aircraft or any person in it or by any article or person falling from such aircraft to any person or property damages are recoverable from the owner of the aircraft without proof of negligence or intention or other cause of action.

Recent American decisions are in accord with the view that the maxim should not be interpreted literally. *Cory* v. *Physical Culture Hotel,* (1936)

U.S. Av. R. 16 and on appeal, (1938) U.S. Av. R., 15; *Hinman* v. *United Air Lines,* (1936) U.S. Av. R. 1; *People* v. *Dycer Flying Service Inc.,* (1939) U.S. Av. R. 21.

Negligence Generally.—While the operation of aircraft requires care and skill in proportion to the risks involved, it has been held in *Fosbroke-Hobbes* v. *Airwork Ltd. & Br. American Air Services Ltd.,* (1937) 1 All E.R. 108 at p. 112, that an airplane cannot be treated as a thing dangerous in itself. Apart from statute the common law duties apply. In *Grein* v. *Imperial Airways Ltd.,* (1936) 2 All E.R. 1258, it was held that after the pilot failed to get any message in reply to his call to Haren, Belgium, he was guilty of negligence in continuing his flight at a level below the height of the wireless masts in the vicinity, instead of trying to get above the clouds, or, if that was too dangerous, turning around to go back to Haren. The airplane collided with a radio mast in a fog. It has been held in the United States that an aircraft operator is not liable when gusts of wind, sudden snow, fogs or rain come so quickly that human foresight cannot take precautions against them. These risks are assumed by passengers (*Law* v. *Transcontinental Air Transport,* (1931) U.S. Av. R. 205). In emergencies a pilot is not required to show the same caution and skill as when there is time for deliberate judgment (*Allison* v. *Standard Air Lines,* (1930) U.S. Av. R. 292).

The negligence found in *Fosbroke-Hobbs* v. *Airwork Ltd.* (*supra*) was that the pilot left the ground with the tail too far down, thereby causing a stall. In *Cubitt & Terry* v. *Gower,* (1933) 77 Sol. Jo. 732, the unsuccessful defendant taxied her plane into the plaintiff's plane which she claimed must have been moved into her runway within 15 seconds before she started her run. The Court referred to the similarity of running down cases. In *Olsen* v. *Corry & Grævesent Aviation Ltd.,* (1936) 3 All E.R. 241, the plaintiff, an infant apprentice, was injured while swinging the propeller because of the pilot's failure to observe the routine of signals up to "contact" before switching on the engine. It was held that the apprentice was not bound by a release of liability in the deed and that *volenti* did not apply. In *Hough* v. *Curtiss Flying Service Inc.,* (1929) U.S. Av. R. 99, it was held that where the plaintiff's intestate after an airplane flight walked towards the hangar and into the revolving propeller and was killed the operator was not liable for having failed to provide guards or an escort or a safer means of egress. The same result was reached in *Hamilton* v. *O'Toole,* (1930) U.S. Av. R. 133, on the ground of contributory negligence, where the passenger left the cockpit and stepped forward off the wing and was struck by the revolving propeller.

An attempt was made in *Maindonald* v. *Marlborough Aero Club & New Zealand Airways Ltd.,* (1935) N.Z.L.R. 371, to apply the principle of the snail case (*M'Alister* (*or Donoghue*) v. *Stevenson,* (1932) A.C. 562) in a claim against the defendant Airways Company which had repaired the plane, but it was held that the defect, if any, was discoverable on a reasonable inspection and that the repairing company owed the deceased no duty.

There are very few reported Canadian cases based on negligence, and it seems advisable to deal with them at some little length. The first decision is *McInnerny* v. *McDougall,* (1938) 1 D.L.R. 22, 47 C.R.C. 229, 47 Man. R. 119, (1937) 3 W.W.R. 625. McDougall, the pilot (who had apparently flown sufficient solo time to entitle him to carry passengers), had on the morning of the day of the flight in question, passed the required tests. One may question, therefore, the relevancy and admissibility of certain evidence which was introduced, indicating that, some six weeks before, McDougall had failed to pass and that the inspectors considered his flying then very unsatisfactory and that he required more dual instruction. The accident happened on September 24, 1933, and the defendant had held a pilot's certificate in the United States since 1931. His dual control machine had been signed out as airworthy, but

after it had been in the air only about 20 minutes it developed engine trouble and began to slow up noticeably. The pilot decided to land. He picked out a field which was found on the evidence to be in all respects suitable, flew over it and examined it, noted from nearby water the direction of the wind, and prepared to land. As his machine was not then into the wind he began to turn which, of course, required him to bank. To quote the judgment: "Something then happened. The plane went straight down, crashed, and McInnerny died shortly from the injuries he received." Several explanations as to how the accident happened were made at various times by the pilot. The truth probably is that he did not know. On one occasion he said he was side-slipping into the field when he suddenly felt the machine go limp; at another time, that he thought he was going to over-shoot the field, started to bank the plane, lost air speed, one wing dropped and the plane turned over; that he lost speed and when he attempted to make the turn he had not sufficient momentum to carry the plane around. On his examination for discovery he said he felt the rudder go sluggish and that the only explanation he could give was that the passenger must have put his foot on the rudder bar. It should be mentioned that the regulations required him to cut off the dual control and that he had not done so. This, however, was found, rightly I think, not in itself to constitute negligence. At the trial he said that in the turn he hit an air bump or downward current which shot him up and the craft came down again and seemed to quiver. He cut off the motor just before the crash. There was no evidence to support the theory that the passenger had interfered with the controls. The Court did not accept the suggestion about the air bump but found that the area was not a bumpy one and that it was not reasonable for a bump to occur at a low altitude. Without suggesting that the finding that a bump had been the cause of the mishap in this case was erroneous, I make bold to suggest that expert evidence would show that bumps are likely to occur near the ground. The Court found that the pilot had allowed his plane to lose the necessary speed at an altitude where it was impossible to regain control. This may have happened while the pilot was engrossed in watching his landing rather than his instruments. The pilot intimated that he was attempting a cross-wind landing. The Court found that there was no excuse for his making such an attempt. It must be remembered, however, that by this time he was quite close to the ground and in an emergency because of his defective motor. The finding was that the cause of the plane falling was that the defendant did not maintain proper flying speed. One wonders whether, having regard to the engine trouble and the close proximity to the ground, this was not demanding too high a degree of care.

The second case is that of *Galer* v. *Wings Ltd.*, (1939) 1 D.L.R. 13, 48 C.R.C. 322, 47 Man. R. 281, (1938) 3 W.W.R. 481. In this case the accident happened on April 10, 1936, while winter flying conditions still existed. The take-off was made from ice. When the plane was only a short distance up one of the blades of the propeller broke, resulting immediately in the engine being torn away from the plane which caught fire and fell on the ice. The learned trial judge held that ordinary principles of the law of negligence must be applied. It was conceded by counsel for the defendant company that the defendant was in the legal position of a common carrier of passengers by air. Such an admission carries with it sundry implications, for every common carrier is, in the absence of a special contract, liable in tort for negligence. In the United States, a common carrier of passengers by air cannot limit its liability but this is not the law of Canada and liability can be limited, at all events until the Carriage by Air Act, 1939, comes into force. Here it was contended by the defendant that there existed a special contract relieving the carrier from liability, contained in apt language endorsed on the ticket made out by the defendant company for the plaintiff and the two other passengers. The

tickets, however, were never delivered. The passengers were not asked to sign in the place left for that purpose and were not given the usual duplicate carbon copies. The passengers were told that they might pay at the commencement of the trip or on their return. They agreed to pay on their return. The plaintiff had made many trips in the plane of the defendant company. He admitted that he had on some of such occasions read the ticket and had sometimes signed it and that he knew that the tickets contained a release, and was also aware that all Canadian air transport companies had, at that time, release clauses on their tickets. He understood that they were not binding on a passenger, whether signed or not. The Court said that if the releases were a part of the contract, that alone would seem to dispose of the plaintiff's action. On the evidence the Court found it impossible to hold that a special contract had been distinctly declared and deliberately accepted. The Court held it was a fact that the ticket was never issued to the plaintiff and that he did not expressly or impliedly assent to the release appearing thereon.

At trial the defendant amended its pleading and set up that it was a custom and usage in the province in question, and in Canada generally, for passengers to assume all risk of injuries while being carried by air. The Court found that the evidence failed to establish the notoriety and certainty of such custom as would be required, and made no finding as to whether such a usage could be held to be reasonable; that the contract to carry in this case was made by the booking of passage by the plaintiff with no conditions attached, and that there was an implied obligation upon the defendant to use all reasonable care and diligence to carry the passenger safely to the agreed destination.

On the question of negligence the Court pointed out that the onus lay first with the plaintiff; that it does not appear that a higher degree of care is demanded of a common carrier than of a private carrier; that carriers of passengers are not insurers of the safety of passengers whom they carry, nor do they warrant the soundness or sufficiency of their vehicles; that their undertaking is to take all due care and carry safely so far as reasonable care and forethought can attain that end; and the care required is of a very high degree; that while they do not warrant the soundness or sufficiency of their vehicles they are answerable for any defects that careful and reasonable examination would reveal; that periodical testing and examination is a duty and that the fact that an aircraft breaks down, as it did in this case, is *prima facie* evidence of negligence; that if they have taken all reasonable care and used the best of precautions in known practical use for securing safety, carriers are not liable for accidents due to latent defects in their vehicles which precaution does not discover (see p. 19 D.L.R., p. 329 C.R.C., p. 488 W.W.R.). The Court held that the plaintiff, having shown that a propeller blade broke, which is something that in the ordinary course does not happen if proper care is exercised, had satisfied the initial onus which rested upon him, and the defendant was called on for an explanation.

The propeller had been manufactured in the United States. The type had the approval of the Department of Transport at Ottawa (but it was proved that licence to manufacture that type of propeller had been cancelled by the Government Department in the United States). The propeller had been in use by the defendant and previous owners since August, 1932, but, of course, not continuously. In July, 1935, the propeller had been overhauled and the blades etched. As already stated, the accident happened on April 10, 1936. On April 8 the plane had been flown from Sioux Lookout in Ontario to Winnipeg in Manitoba. The pilot who flew it reported roughness in the machine to the defendant's chief engineer, and someone from the defendant company advised the local agents for the propeller manufacturer that the propeller was being sent in, presumably for checking. The party in charge of the checking suggested to the defendant company that the blades from their appearance required smoothing out. He was told that the propeller was wanted almost at once and that there was not

time for that, and the propeller was sent to the defendant. The supervisor of the works, himself a pilot, said there was nothing to justify him in saying that the blades were not airworthy; that he would not have returned them if he had thought so and that they were in fair serviceable condition; that he would have been prepared to use them himself without hesitation. The defendant's chief engineer said that the instructions given by him to the propeller company's agent were to check the pitch and balance and to remedy anything which might cause roughness. The propeller was found slightly out of pitch and slightly out of balance. It was taken apart to balance it and one blade (the unbroken one) loaded a little by adding lead in the hole in the shank. The pitch was reset and the balance again checked and found satisfactory. It was returned to the defendant after 3½ or 4 hours' work. The plane was signed out on the day in question by an air engineer. It was then sent off for a 2½- or 3½-hour trip, and according to his evidence the pilot found it then to be satisfactory in every respect. On behalf of the plaintiff, passengers on trips several days just prior to the accident swore that the engine vibrations seemed excessive. Mechanics had worked on the motor, including the propeller, for an hour or more just before the plane started on the fatal trip.

There was also considerable evidence given respecting the condition of the spark plugs, which had been found to be oiling up, a possible cause of roughness. After this last work was done, and before the passengers were taken on, there was no air test. However, on the day in question, the same pilot who was at the controls at the time of the crash had flown the machine on a routine trip for 2½ hours in which he had made five stops. He had no trouble except on the return trip, when he noticed a roughness due, he added, to the plugs, which were then examined and two replaced. Just prior to the take-off it was found on ground test that the engine was perfectly normal in every respect. It was established through expert testimony at the trial that the break was a fatigue failure. The conclusion of the expert which the Court accepted was that the failure was rapid, a matter of minutes at the most.

Weighing a great mass of evidence the Court found these facts. "The cause of the blade failing was that it was inherently defective in design. As a result the stresses operating on it at the point were too high and impaired the margin of safety intended to be provided. The normal service of the blade superimposed on the original weakness caused the break. The material was flawless; it was broken by fatigue." (p. 33 D.L.R., p. 345 C.R.C.) The evidence showed that the roughness in operation could be caused either by a defective propeller, by oily spark plugs or in other ways. The evidence had established that roughness was reported on the return trip taken on April 8; again on the 9th. The pilot had found roughness again in the earlier trip on the 10th. The Court found that on each occasion it was a temporary condition probably caused by foul spark plugs, and that this was on each occasion corrected. The Court also found that scientific knowledge as to the failure of propellers due to fatigue could not reasonably be expected of the defendant company's officials; that the company had no doubt as to the airworthiness of the propeller and no reason to suspect that the blade was in any way defective; that it was not reasonable to expect the company to install a new or other propeller; that the company was not negligent in not having the machine tested in the air before the final flight, pointing out that the air regulations did not call for this being done after spark plugs have been changed. Dismissing the action, the Court did so without costs, stating, "I see no reason why experience in commercial aviation should be purchased solely at the expense of passengers." (p. 44 D.L.R., p. 358 C.R.C.)

Two other passengers brought each separate actions but proceeded to trial together before Mr Justice Dysart of the Court of King's Bench for Manitoba. (*Nysted* v. *Wings Ltd.* and *Anson* v. *Wings Ltd.* (1942), 3 D.L.R. 336, (1942)

3 W.W.R. 39.) On the same claim as was before the trial judge in *Galer* v. *Wings*, but with additional evidence, Dysart J. applied against the defendant the doctrine of *res ipsa loquitur*, as had the judge in the earlier trial, but found, *contra* to his brother judge, the defendant's explanation did not rebut the inference of negligence and that, therefore, the defendant was liable.

The learned trial judge said that the law which governed carriers by air is the same as that which governs carriers by land or sea; he found that the defendant was a common carrier, and that the plaintiff was a passenger for hire.

In respect to the plaintiff's luggage, the defendant was held to be an insurer of the safe delivery of the goods at their destination subject only to acts of God and of public enemies, the learned Justice holding, that this was an absolute liability followed from the fact that the defendant was the bailee as well as the carrier of the goods and so was responsible for their safe delivery.

In respect to the plaintiffs themselves, it was held that the defendant was not an insurer of their safety; that its duty towards them was to exercise adequate care in all that pertained to the sufficiency and operation of the vehicle; to carry them with all necessary care, and that what constituted adequate care in each particular instance depended upon the circumstances and could not be declared in any precise terms.

Then as to burden of proof the learned trial judge, as already indicated, held that the doctrine of *res ipsa loquitur* should be applied.

The court rejected the contention of the defendant that the defect, if any, was a latent defect, finding that expert examination and analysis had set this question at rest; that the metal was of uniform quality throughout and free from defects of quality or manufacture.

As already indicated the Court found first that the onus had been shifted to the defendant, and then that the defendant had not rebutted the inference of negligence and was, therefore, liable.

In *Malone v. Trans-Canada Air Lines*, (1941) 3 D.L.R. 781, O.W.N. 238, is reported the disposition of a motion made by the defendant before the Master (whose decision was appealed from unsuccessfully to a Judge in Chambers) for an order for particulars of negligence. The defendant maintained that it was entitled to know what negligence, if any, was alleged by the plaintiff. The action arose out of the crash of the defendant's aeroplane near Armstrong, Ontario. A general allegation of negligence was set out in the statement of claim and, evidently, the plaintiff relied on the doctrine *res ipsa loquitur*. Counsel for the defendant contended that the principle could not apply in this case because the aeroplane had been in flight for some hours before the accident happened. The Court, however, declared that there was no difference in the application of the principle when an aeroplane was about to make a landing and when it was about to take off as in the case of *Fosbroke-Hobbes* v. *Airwork Ltd.*, (1937) 1 All E.R. 108, and accordingly it was held that the plaintiff in this present case should not be required to give particulars of negligence of which he knew nothing. This case would appear to indicate a further tendency on the part of the Canadian Courts to allow the claimants the rather liberal use of the doctrine. It will be remembered that the crew of three and all passengers were killed, and the accident happened at night, making observation difficult, to say the least.

Malone v. *Trans-Canada Air Lines* went to trial before a jury in March, 1942, and the following are the questions submitted to and answers given by the jury.

1. *Q.* Has the defendant satisfied you that the accident was not caused by negligence on its part? *A.* No.

2. *Q.* Was there negligence on the part of the defendant which caused or contributed to the cause of the accident? *A.* Yes.

3. *Q.* If so, in what did such negligence consist? Answer fully. *A.* The

pilot made an error in judgment and brought the plane too low in his approach toward the runway, causing the plane to hit the tree-tops and consequently crash.

On these answers the trial judge entered judgment for the plaintiff. It will have been noted that the first question appears to have been based on the assumption that the onus was on or had been shifted to the defendant, and that in any event by the answer to the second question negligence has been found by the jury on the part of the defendant. On review, the Court of Appeal for Ontario dismissed the appeal of the defendant (1942) O.R. 453, (1942) O.W.N. 401, (1942) 3 D.L.R. 369.

The case of *Ludditt* v. *Ginger Coote Airways Ltd.* raised the question of the effect of the Transport Act, 1938 (Can.) C. 53 upon the terms of a contract purporting to limit liability.

In this case the plaintiffs booked passage on the defendant's aeroplane for a trip from Vancouver to Zeballos. The defendant had been granted a licence under the Transport Act. The schedule provided for a tri-weekly service between Vancouver and Zeballos. Under the approved schedule and charges the passenger fare between those two points was $25.00.

During the course of the trip a fire occurred on board the plane, forcing it to land on the surface of the water and, in consequence, the plaintiffs lost their luggage and were severely injured. It was found as a fact at the trial that the fire was due to the negligent operation of the plane.

The tickets issued to the plaintiffs were expressed to be subject to certain conditions, set out on the backs, to the effect that the defendant company should in no case be liable to the passenger for injury, loss or damage caused by negligence or default or misconduct by its agent, servants, or otherwise howsoever.

The argument for the plaintiffs (accepted by a trial judge for British Columbia, (1941) 3 D.L.R. 504, 2 W.W.R. 397, but reversed in the Court of Appeals for that Province, (1942) 2 D.L.R. 29 and Supreme Court of Canada, (1942) S.C. 406) was that as the fare between the two points had been established under the statutory regulations, the defendant could not attach conditions to the contract of carriage abolishing its liability, at least not without a new and valuable consideration.

In a comprehensive judgment on appeal McDonald J.A. (later Chief Justice (B.C.)), reached the conclusion that a common carrier has the right to contract out of liability and that this right is an ancient one which required the intervention of the Legislature to set aside as was done in England by the Railway and Canal Traffic Act, 1854, c. 31, in the case of carriage of goods only. Sloan J.A. agreed in the result, while McQuarrie J.A. dissented on the ground that the release was not binding on the respondents having regard to the implied warranty that the aircraft was reasonably fit to encounter the ordinary perils of the flight, which it was not.

On appeal to the Supreme Court of Canada (*supra*) the Court, affirming the judgment appealed from, held (Herwin and Taschereau JJ. dissenting) that the appellant's action was barred by the terms of the special contract contained in the ticket and, therefore, the respondent was relieved of any liability towards them.

In spite of this case the question cannot yet be considered settled, see Chitty on *Contracts,* 19th ed., p. 724. It is obviously unreasonable on the part of a carrier to ask a passenger paying full fare to exempt him for the consequences of the carrier's neglect or default, and this has been recognized by the Courts in the case of carriers of goods, see *Peek* v. *North Staffordshiye R. Co.,* 10 H.L., 473, per Lord Blackburn, p. 511, and 4 Hals., 2nd. ed., p. 42, note (*d*).

It may be noted that by s. 5 (1) (*d*) of the Transport Act (1938) the Board, in considering the application for a licence to operate aircraft for reward, is

authorized to consider, *inter alia*, the financial responsibiltiy of the applicant, including adequate provision for the protection of passengers, shippers and the general public by means of insurance. Presumably such insurance as is contemplated would indemnify the licensee against liability imposed by law in the same manner and to the same extent as a standard Canadian owner's automobile policy. Such an insurance coverage would not adequately protect the passenger where the licensee had contracted out of liability. Therefore it would appear to follow that the Board may withhold an operating licence from a carrier by aircraft who attempts to carry goods or passengers without accepting any risk.

On April 2, 1942, Chief Justice Greenshields in the Supreme Court of the Province of Quebec, handed down judgment in the cases of *Turgeon* v. *Quebec Airways Ltd.* and *McFarlane* v. *Quebec Airways Ltd.*, tried jointly and reported (1942) U.S. Av. R. 201, 48 Rev. de Jur 396. One Davidson, who was interested in certain timber limits in Labrador, contracted verbally with De Blicquy, then general manager of the defendant company, for an aircraft to fly him and his forest engineer, one Cote, from Montreal to Northwest River, Labrador, and return. At the time the contract was made Davidson selected one of the defendant's aircraft, a hydroplane, and also named De Blicquy and another pilot, Forrester, as the pilots. It was agreed that the aircraft would be equipped with a portable radio to enable the pilot or passenger to communicate with a radio station in an emergency, and also a ration box, sufficient to maintain the three men for two or three days in case of necessity.

The party started from Montreal about 1 p.m. on September 10, 1939, with De Blicquy at the controls. They reached Manicouagan, near Baie Comeau, P.Q., about 4.15 p.m. on the same day. There is no record of what took place on the following day, but on September 12 De Blicquy for the first time informed Davidson and Cote that he was unable to continue the trip. Instead of arranging for Forrester to take over, De Blicquy told them that the plane would be piloted by one Fecteau, who, De Blicquy said, was familiar with the territory over which the flight was to be made and was a skilful and experienced pilot.

The plane left Manicouagan on September 12, piloted by Fecteau and proceeded to Moisie from which it departed at 2.30 p.m. after taking on 76 gallons of gas, to continue the trip to Northwest River, a distance of about 360 miles. That night the pilot landed on an unnamed lake 20 miles north of the Hamilton River. On the following morning the pilot started the plane about 8.30 a.m. but got lost, going too far north, and eventually turned east and landed on a large inlet of the north Atlantic Ocean about 120 miles off his course. The party spent the night of the 13th at this inlet and continued their flight about noon on the following day going south down the coast but the supply of gasoline failed and the pilot turned inland and landed on a lake approximately 117 miles north of the village of Northwest River. The events which took place after the plane left Manicouagan were recorded in the pilot's log book, written up by Fecteau, the first entry dated October 31, 1939, and in the official log book of the plane the last entry is under date of September 14, 1939. There was no hint of bad flying weather. There were also various other documents under different dates, most damaging to the defendant's case which indicated that the plane had run out of gas and that the gasoline gauge had indicated gasoline in the tanks when there was none; that the radio was never of any use as it was out of repair. Production of these documents was objected to by defendant's counsel but was allowed in the case of Fecteau's handwriting, on the ground that he continued to be in charge of the plane and his admissions were in the same class as those of a captain of a ship recorded in the log, and the court found as a fact that the gasoline gauge was defective and that the radio was not a proper radio for the purpose for which it was carried. All three men died, as a result of their exposure, about the latter part of November or the early part of

December, 1939, and the bodies were discovered in March, 1940. The widows of Davidson and Cote sued the Airway line.

In addition to the allegations of negligence in respect of the faulty gasoline gauge and radio and that the defendant's pilot was incompetent and unfamiliar with the territory, it was alleged that although the safe arrival of the aircraft at Northwest River was to have been immediately reported by radio to the defendant's station at Manicouagan, the defendant company failed to send out search parties on being informed by Northwest River that the plane had not arrived and did not do so until September 24 when bad weather, owing to the near approach of winter in that part hampered the search. In any event the searching parties did not cover the territory where the plane had come down as it was so far out of the course and the search was abandoned on October 20, 1939.

The defence relied on a release contained in two tickets which De Blicquy produced at Manicouagan. There was no suggestion of limitation of liability in the contract completed between the parties at Montreal and the Court found that the tickets were either carried by De Blicquy and never exhibited to Davidson or were made out by De Blicquy and handed to Fecteau with instructions to have Davidson and Cote sign them and to witness their signatures. As a matter of fact Davidson and Cote both signed the tickets which contained the following condition: " I take all risks of every kind no matter how caused and I hereby absolutely release and discharge the company of and from all actions, causes of actions, claims and demands of every kind whatsoever which I or my heirs, executors, administrators or assigns, may now or may or can at any time hereafter have against the company for or on account of any loss, damage or injury to me, my person or property while so travelling, whether in or on any such aircraft or getting into or off or in or out such aircraft or in any manner in connection with or as a consequence of such journey or any delay therein by reason of such aircraft and whether any loss, damage or injury be caused by the negligence, fault or misconduct wilful or otherwise, by the company, its agents or servants or otherwise howsoever."

Furthermore, the defence alleged that as the accident which caused the deaths occurred within the limits of the territory of Newfoundland whereby it was claimed the plaintiffs were debarred from recovery on account of the release contained in the tickets.

However, the Court held that the wrongful acts which brought about the deaths of the men were committed by the defendant and its employees in the Province of Quebec and it was, therefore, the law of Quebec which governed the rights of the plaintiff and the obligations of the defendant.

So far as the conditions contained in the tickets were concerned the Court held that it was not called upon to decide whether these conditions would avail under the law of the Province of Quebec in any action that might have been taken by the contracting parties since the plaintiff's actions were personal actions and in no way representative and any agreement or contract made by the deceased husbands could not under the law of Quebec avail as a defence.

This case serves to illustrate differences between the Quebec Civil Code and the common law. The decision is really a matter of interest rather than of authority for the common law provinces. Several points which arose in the case were resolved in a manner contrary to the ideas prevailing elsewhere in Canada. Reference may be made here particularly to:

The judge's observations on the release contained in the tickets and its lack of effect in an action brought by the widows. In this connection, the judge is reported as saying " There is no doubt that the deceased, Davidson and Cote, both signed the so-called tickets containing the conditions above mentioned. Whether these conditions would avail under the Province of Quebec as a defence to any action which might be taken by the contracting parties,

Davidson and Cote, I do not and I am not called upon to decide but what I do decide and hold is that they are not a defence to the action of the present plaintiffs. As has already been said the plaintiffs' actions are personal actions and in no way representative and any agreement or contract made by the deceased husbands cannot avail as a defence to the plaintiffs' actions." Furthermore, the Court expressed the opinion that in regard to the contract made between the deceaseds and the defendant company at Montreal, as the plaintiffs were not parties they were not bound thereby, nevertheless " it might be that if the defendant violated that contract by doing something not covered by the contract but contrary to the terms of the contract or did something it ought not to have done under the terms of the contract which amounted to an act of commission or omission, amounting in law to a fault, it might, indeed, engage the liability of the defendant." In other words, for one purpose the defendant was bound but not for another.

The judge treated the whole case as a rising *ex delicto* or what the common lawyer would call a tort as distinct from contract. However, it would be a novel doctrine in the common law provinces to suggest that where there is a contract in existence the terms of that contract can be completely disregarded by a person who prefers to sue in tort rather than in contract.

Dealing with the terms of the contract made between the parties in Montreal the Court held that when De Blicquy informed the deceaseds that he did not intend to continue the trip they had no alternative but to take the pilot whom he nominated then or to return to Montreal. The judge did not deal with the question (and apparently taking the view he did it was not necessary to do so) whether a new contract was entered into between the parties at Manicouagan. It would seem as though there would be a lot of weight to such a contention. Undoubtedly the deceaseds, on the terms of their original contract, could have thrown up the trip and returned to Montreal and sued the defendant for breach of contract. They did not do so but chose to continue the trip and in that it might well be argued that there was a new contract between the parties and that the tickets evidencing such a contract were valid. If that view is correct then the very important question arises as to whether under Quebec law the deceaseds were bound by the release contained in the ticket. That point the Court did not feel it necessary to decide although it did decide the almost equally important point, whether the immediate relatives of the deceaseds were bound by the conditions in favour of the plaintiffs. As we have already mentioned such a finding is not, in our opinion, in accordance with the law laid down in England and elsewhere in Canada.

Mention should also be made of *Yukon Southern Air Transport Limited and Phœnix Assurance Company Limited* v. *His Majesty the King,* (1942) Ex. C.R. 181. This is an action to recover from the Crown, damages suffered by Yukon Southern Air Transport Limited through the total loss of an aeroplane owned by it, due to the alleged negligence of officers and servants of the Crown acting within the scope of their duties or employment. The action arose as the result of a collision between a Hawker Hurricane aeroplane belonging to the Crown and a Ford tri-motor aeroplane, the property of the air transport company at an airport owned by the Crown. The Phœnix Assurance Company was added as a claimant as it had paid the sum of $15,000.00 to the transport company pursuant to the terms of an insurance policy. The air transport company's plane was parked on the airport with the permission of the authorities thereof. In endeavouring to take off in the Hurricane aeroplane the pilot brought it into collision with the parked plane and demolished it beyond repair.

The Exchequer Court, overruling the objection of the Crown, held that it had jurisdiction over such a claim. Counsel for the transport company submitted that the maxim *res ipsa loquitur* applied and that it was incumbent upon

the respondent to establish that the collision had not been the result of the negligence of an officer or servant of the Crown acting within the scope of his duties or employment, the respondent on the other hand contending that the maxim did not apply against the Crown. The Court ruled that the maxim did apply, except that the suppliants would have to prove that the person who caused the accident was an officer or servant of the Crown acting within the scope of his duties or employment, which fact the Court held proven.

The respondent then rested his defence upon inevitable accident. The Court held that the onus was upon the respondent to prove an absence of negligence on the part of its officers or servants where the plane in taking off had collided with one lawfully parked and stationary, and in any event held that there had been negligence in allowing the pilot to fly the machine in question when it was known that he had no experience with this type of aeroplane and that the type of machine, more than any other plane yet flown by the pilot, was known to be subject to torque and therefore unless properly driven more liable to swerve to the left instead of following a straight line; that there was negligence in not advising the suppliant that its aeroplane was liable to be struck and should be removed. Further, the Court held that the pilot was negligent in not properly listening to or at least not following the instructions given him; in putting on, inconsiderately, full power at the start; in not shutting off the throttle as soon as he noted that his plane was leaving the runway and swerving to the left, and in not stopping it when there was plenty of room to do so.

The Court in assessing damages, held that the principle of subrogation applied to the present case to the extent of the damages paid by the insurer.

See also *Smith* v. *The King*, (1945) 1 D.L.R. 270, the decision of the Supreme Court of Canada, reversing the president of the Exchequer Court at trial and finding the Crown liable for the negligence as was found on the facts of a student pilot in training in the Air Force where the pilot, alleged but not proven lost, had landed on an airfield under construction, and damaged the plaintiff's equipment then being used in such construction.

Breach of Statutes or Regulations as Negligence.—As has already been mentioned, s. 4 (1) (i) of the Aeronautics Act gives the Minister power to make regulations with respect to the institution and enforcement of such laws, rules and regulations as may be necessary for the safe and proper navigation of aircraft in Canada, etc. By s. 4 (3) all regulations upon being published shall have the same force in law as if they formed part of the Act and by s. 4 (2), penalties are imposed for breaches of regulations. This subsection will no doubt be pressed as indicating that the regulations do not affect civil rights, this on the strength of the dictum in *Winnipeg Elec. Co.* v. *Geel*, (1932) 4 D.L.R. 51, A.C. 690, 3 W.W.R. 49, 40 C.R.C. 1, but it is likely that these regulations will be held to establish duties and that an action will lie for any damage shown to have resulted from a breach. The question is one of the intention of the Legislature but the present tendency seems to be to treat the statutory provisions governing other forms of transportation as creating civil rights. For Canadian decisions see *Connell* v. *Olsen*, (1933) 3 D.L.R. 419, 1 W.W.R. 654, 41 Man. R. 197, and *Falsetto* v. *Brown*, (1933), 3 D.L.R. 545, O.R. 645. In England the tendency is clearly towards giving civil rights for "statuory negligence." See *Lochgelly Iron & Coal Co.* v. *M'Mullan*, [1934] A.C. 1, and also *Monk* v. *Warbey*, [1935] 1 K.B. 75. See also articles in (1935) 13 *Can. Bar Rev.* 535, and 3 *Fortnightly Law Journal*, 310. The question has been considered with relation to aviation in the case of *Dominion Air Lines Ltd.* v. *Strand*, [1933] N.Z.L.R. 1, where it was held by the majority of the Supreme Court of New Zealand that the breach of the aviation regulations gave civil rights notwithstanding the presence of a penalty section.

In *Maindonald* v. *Marlborough Aero Club & New Zealand Airways Ltd.*, [1935] N.Z.L.R. 371 the case against the defendant Club was based on the

failure to hold a ground inspection and on breach of the regulations in the failure to hold such inspection but the Court held that the necessary " nexus " between the injury and the breach of the statutory duty had not been established because the ground inspection did not touch the defective cotter pin which caused the accident.

Res Ipsa Loquitur.—The principle of *res ipsa loquitur*, while a rule of evidence is so important that it usually received separate treatment in negligence tests, and in aviation disasters, where frequently the evidence is destroyed and all witnesses killed, the application of the principle must become a question of paramount importance.

That the principle can apply to aviation accidents was stated obiter by Goddard J. in *Fosbroke-Hobbes* v. *Airwork Ltd. and Br. American Air Services Ltd.*, (*supra*) commented on in 83 *Law Journal* at p. 110. In that case the plane had risen from the aerodrome to a height of 75 to 100 feet when it crashed, as His Lordship found, because the pilot left the ground with the tail end of the plane too far down, causing the plane to stall. The Court held that *res ipsa loquitur* applied but also found specific negligence. It is submitted that the principle should be applied with great caution, if at all, to those unexplained crashes which destroy all evidence, as well as the company's servants who would ordinarily be available to give the explanations which might shift the onus. Aeroplanes fall in many instances from causes beyond the pilot's control. See 2 *Corpus Juris Secundum*, p. 910, citing *Rochester Gas & Elec. Corp.* v. *Dunlop* (1933) 266 N.Y.S. 469, where the Court refused to apply the doctrine when the plane crashed into a tower carrying a transmission line. *Res ipsa loquitur* was held not applicable where a plane fell due to the engine cutting out while taking off (*Wilson* v. *Colonial Air Transport*, (1931) U.S. Av. R. 109), but it was applied in charging the jury (*Goodheart* v. *American Airlines Inc.*, (1936) U.S. Av. R. 177), where the plane which was last heard from half an hour after rising was found with its nose embedded in the side of a mountain 200 feet below the top. (The jury nevertheless found for the defendant.) The judgment of the majority of the Supreme Court of Arkansas in *Herndon* v. *Gregory*, (1935) U.S. Av. R. 38, contains a review of the previous American decisions and holds that the principle *res ipsa loquitur* does not apply where the only evidence is that the plane fell. The opinion of the minority on this point is not easy to ascertain because the real question was whether the complaint was demurrable but apparently the minority were of the opinion that the maxim should have been applied. It would seem that the majority view more clearly meets the needs of aviation law. The plane was destroyed by fire and all four occupants were killed. To hold otherwise would remove the principle of negligence entirely and establish a principle of absolute liability in a large number of aviation cases. This never was the purpose of the rule of evidence as applied to other forms of transportation. It is worthy of note that in *Herndon* v. *Gregory* (*supra*) the Court relied to a great extent on the analogy of a ship at sea and likened " perils of the air " to " perils of the sea."

In *McInnerny* v. *McDougall*, (1938) 1 D.L.R. 22, 47 C.R.C. 229, the Court held that the doctrine of *res ipsa loquitur* applied; that the accident itself was sufficient proof of negligence and that " while he was making a simple landing an accident happened, which would not, in the ordinary course of things, have happened without negligence." (p. 27 D.L.R., p. 235 C.R.C.) One might ask whether in fact the pilot was making a " simple landing." It was an emergency landing, commenced, presumably from necessity, close to the ground with a failing engine. The Court said: " The defendant has not rebutted the *prime facie* case made out by the application of the above rule of evidence. He has not satisfied the onus placed upon him." The statement in respect of

onus could not have been intended as a statement that the onus was on the defendant from the first, because, of course, it was not.

In *Cohn* v. *United Air Lines Transport Corp.*, (1937) U.S. Av. R. 119, the American cases are collected and discussed and in the case itself the Court refused to apply the doctrine. The plane in which Cohn had been riding crashed on a test flight killing all four occupants. The Court took the view that the rule applied only when the conclusion from the admitted facts pointed in the direction only of negligence, and no other inference.

In *Copy* v. *Air Associates Inc.*, (1937) U.S. Av. R. 99, the Appellate Court of the State of Illinois refused to apply the doctrine where a parachute furnished by an aeroplane owner failed to open as a result of which the plaintiff was injured.

In *Boulineaux* v. *City of Knoxville*, (1937) U.S. Av. R. 145 the Court of Appeals for the State of Tennessee refused to apply the doctrine to cases where there was no evidence as to the cause of the aeroplane crash.

In *Gales* v. *Wings Ltd.* (*supra*) it will have been noted that both trial judges held the onus shifted by the plaintiff to the defendant upon the plaintiff proving that the accident had happened when a propeller on the aeroplane had broken in flight but then proceeded to hold that the defendant had satisfied the onus. In *McCoy* v. *Stinson Aircraft Corp.*, the decision of Kelly J. of the High Court of Justice for Ontario, (1942) U.S. Av. R. 154, the Court refused to apply the doctrine in an action against the manufacturer of the aeroplane although the wing of the plane broke in mid-air. The plaintiff's case was put entirely on alleged negligence in and about the welding of a gusset to a wing. It was alleged that in the nature of the aeroplane structure it was a negligent thing to weld a gusset to a wing, that it was negligent because the welding operation would weaken the plate which did break and so caused the crash. The second ground was that the welding itself was done negligently so that it formed a weak bond which in itself caused the crash. The judge found that the welding did not in any way weaken the plate, or, at any rate, weaken the plate as regards the force which brought about the crash; second that it had not been proven that a weak weld was the cause of the break, that is, in the original plate. The repair job was done in September, the plane was in continuous operation from September to January except for a period of about five weeks. It was held that the plaintiff fell far short of eliminating extraneous causes which might have accounted for the defective condition which undoubtedly brought about the crash. Further it was held that on the evidence, there was no negligence, that there was nothing of which the defendant corporation was under a duty to warn anybody; and that the repair was a matter of good practice, and that the action should be dismissed.

See also *Malone* v. *Trans Canada Air Lines* (*supra*.).

Aircraft as Carriers of Goods and Passengers.—Since much of our flying involves American as well as Canadian law it is of use to note that the authorities in our two countries on aircraft as carriers are in substantial conflict both as to when aircraft companies are common carriers and as to the incidents of that relationship. The American cases more readily find that the relation exists and, having so found, many of them deny, on the ground of public policy, the right to limit liability for both goods and passengers.

DOUBLE TAXATION IN REGARD TO DEATH DUTIES

[*Contributed by* R. F. Bailey, Esq.]

The mediæval customs of *heriot* and *mortuary* may be likened to a primitive system of death duties, and afford evidence of the antiquity of the practice of levying a tax on the occasion of inheritance. The selection of the deceased's best beast and best chattel is, however, obviously inequitable and arbitrary, and taxation has long since proceeded on different principles.

In modern times taxation, whether of income or capital, has been based upon the faculty theory, or the theory of ability to pay, and certain principles have been evolved by which States are guided in framing their Revenue laws.

The question of the competence of States in matters of taxation was considered in the Report[1] on Double Taxation which was submitted to the Financial Committee of the League of Nations in 1923 by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp, who propounded four general principles in accordance with which States are accustomed to impose taxes:

(*a*) political allegiance, or nationality,
(*b*) temporary residence,
(*c*) domicile, or permanent residence, and
(*d*) location of wealth, or situs.

Nationality still plays a minor rôle in the death duty systems of some countries,[2]

It was pointed out in the Report that the reason why States waver between these principles is that they may be regarded as elements in the broader modern doctrine of economic allegiance. The underlying theory of this doctrine is that "a part of the total sum paid according to the ability of a person ought to reach the competing authorities according to his economic interest under each authority. The ideal solution is that the individual's whole faculty should be taxed, but that it should be taxed only once, and that the liability should be divided among the tax districts according to his relative interests in each. The individual has certain economic interests in the place of his permanent residence or domicile, as well as in the places where his property is situated or from which his income is derived. If he makes money in one place he generally spends it in another." Dual taxation arises when two countries impose taxes on different principles, e.g., State A taxes property on the basis of domicile, and State B taxes the same property on the basis of situs. Which Exchequer ought to bear the burden of paying for any relief given for double taxation, was the question examined in the Report.

The application of the doctrine of economic allegiance to particular categories of property was considered in the Report, and, in regard to death duties, preference was expressed for the claim of the country of situs in the case of real estate and movable property closely connected with real estate, such as machinery, agricultural implements, flocks and herds; but the claim of the country of domicile was preferred in regard to corporate shares, corporate bonds, and general credits. Vessels, it was suggested, should be taxed in the country of registration; and real estate mortgages in the country of location of the land, the death duty position differing in this case from income tax. In regard to industrial and commercial enterprises, it was recommended that the tax should be shared, the greater part being assigned to the country of situs, and the country of domicile[3] being entitled to the tax attributable to the element representing goodwill. In other words, it was suggested that, in the main,

[1] League of Nations Document E.F.S. 73. F. 19. Authorized agents for the publications of the League of Nations in Great Britain, Northern Ireland and the Crown Colonies: George Allen & Unwin, Ltd., 40, Museum Street, London, W.C.1.

[2] As in the United States of America.

[3] The word "residence" is used on several occasions in the Report, where "domicile" is apparently intended.

real estate and personal property closely associated therewith, including mortgages, should be taxed in the country in which the real estate is located; and that personal property not so associated, and in particular incorporeal or intangible wealth in the form of corporate or public securities, should be taxed in the country of domicile.

Four general principles for the avoidance of double taxation were set out in the Report, and it was considered appropriate that, in regard to death duties, the various categories of wealth should, as it were, be "assigned" to the competing States in accordance with the rules stated above, and where one country had the predominant right on the ground of situs, it should assume the exclusive right of taxation, the right of the country whose claim depended on domicile being wholly surrendered. Where the complications of an attempt to assign wealth were great, or where, in cases of large wealth, the share of allegiance due to domicile might be much more fully recognized, it would perhaps be desirable for the competing States to compromise by making a more or less arbitrary division of tax.

If relief from double taxation were made in accordance with these proposals, anomalies or injustice might arise, owing to the existence of graduated or progressive taxation. The rate at which tax is levied is commonly based upon the total value of the estate of the deceased, and the rates might rise much more steeply in one country than another. In order to avoid these results, the Report suggested that "the country of residence[4] should apply to the entire estate the appropriate rate of tax, and should then deduct from the sum thus payable the amount of the tax levied (according to the principle laid down above) on that part of the estate situated in the country of origin, provided that the amount so deducted does not exceed the sum which would have been levied on that part of the estate if it had been situated in the country of residence." This proposal recognizes, in the cases of larger wealth, the relatively higher claim of economic allegiance of the country of domicile, and concedes to it not only the right to tax property abroad, but also to take such property into account in determining the rate of its tax. Double taxation is avoided by the remission, in the country of domicile, of the tax paid abroad.

A further Report on Double Taxation and Tax Evasion[5] was submitted by Technical Experts to the Financial Committee of the League in 1925, and a draft "Bilateral Convention for the Prevention of Double Taxation in the Special Matter of Succession Duties"[6] was prepared by a Committee of Technical Experts in 1927. This document was circulated to all States whether Members of the League or not, and their observations were subsequently published.[7] In 1928 a General Meeting of Government Experts was convened and the 1927 draft Convention was slightly amended.

Under the 1928 Draft,[8] "succession duties" (a term used to cover such duties as the contracting parties might agree) were to be levied in the country of domicile, which was defined as "the country in which the deceased, at the time of his death, had taken up his residence with the manifest intention of remaining there."[9] These duties might be levied on the whole estate, wherever situate. In the absence of such a domicile, the country of which the deceased was a national was to be considered his country of domicile.

[4] See note [3] above.

[5] Document F. 212.

[6] Document C. 216. M. 85. 1927. II. For a recent draft, see "Model Bilateral Conventions for the Prevention of International Double Taxation and Fiscal Evasion"; League of Nations, Geneva, 1945. Official No.: C. 2. M. 2. 1945. II. A.

[7] Document C. 495. M. 147. 1928. II.

[8] Document C. 562. M. 178. 1928. II.

[9] A different definition was adopted for income tax purposes, on the principle that "a duty which is levied once and for all on the occasion of death must imply a greater degree of permanence than the conception on which an annual tax such as the income tax is based." As to fiscal domicile, see Document F. 212, page 20.

If the deceased was domiciled in one Contracting State, but left property in the other Contracting State, the latter State could levy duty at the rate appropriate to such property, exclusive of assets abroad.

In order to avoid double taxation, the country of domicile was to allow, in respect of immovable property, furniture and fittings belonging thereto, and any other categories of property which might be agreed between the Contracting States, the actual amount of duty levied by the country of domicile on the assets situated in the other country, or the actual amount payable on such assets in the country of situs, whichever should be the less.

Provisions permitting the deduction of debts, and arrangements for the settling of disputes, were embodied in the draft.

If the draft appears vague and uncertain in its provisions, the explanation is to be found in the letter of April 12, 1927, addressed by the Chairman of the Committee of Technical Experts to the Chairman of the League's Finance Committee, in which it was said that "having regard to the diversity of the legislative systems represented in the Committee, and the necessity of finding formulæ capable of acceptance by everyone, it will be recognized that the experts were bound to confine themselves to indicating general rules, leaving particular points of difficulty to be dealt with—in the spirit of the accepted general principles—by those on whom the task of negotiating the bilateral conventions [would] ultimately fall."

Since 1929 work on double taxation has been continued by the Fiscal Committee, and Reports[10] have been published from time to time dealing with particular problems, and commenting on recently concluded treaties. Certain generally accepted principles governing the limits of tax jurisdiction have been formulated, and the draft Conventions have formed the basis of many treaties against double taxation. About twenty-five arrangements have been concluded, a large majority since 1918, relating to death duties, not to mention the provisions operating as between the United Kingdom and British dominions, colonies, and protectorates.

In Great Britain, three main taxes are leviable on the occasion of death—estate duty, legacy duty and succession duty, of which estate duty is by far the most important.

Legacy duty and succession duty are acquisition duties, i.e., taxes on the benefits actually received by a benficiary under a will or settlement, the rate of duty depending on the relationship of the beneficiary to the testator or settlor. Only one of the duties can be levied in respect of the same property on the same death. Double taxation in regard to these duties can only arise in very exceptional circumstances, and arrangements for the relief of such taxation exist as between Great Britain and Eire,[11] and Northern Ireland.[12]

Estate Duty, which was first imposed by the Finance Act, 1894, is payable in respect of all property, real or personal, settled or not settled, which passes on the death of a person dying on or after August 2, 1894. The rate of duty is progressive, depending on the total value of the property passing on the death. It is fortunately sufficient, in this context, to state in the briefest possible terms the circumstances in which the duty may be payable[13]:—

(*a*) if the deceased was domiciled in some part of Great Britain, his im-

[10] For a detailed bibliography of League of Nations publications, to 1939, on double taxation and tax evasion, see "Prevention of International Double Taxation, etc.: Two Decades of Progress under the League of Nations," by Mitchell B. Carroll. Official No.: F./Fiscal/111.

[11] See Double Taxation (Succession and Legacy Duty) (Irish Free State) Declaration, 1926 (S.R. & O., 1926, No. 975).

[12] See s. 52, Finance Act, 1927.

[13] Many other categories of property may be chargeable with estate duty, e.g., certain gifts *inter vivos*, and annuities or other interests purchased or provided by the deceased, and arising on his death.

movable estate in Great Britain, and his movable estate, *wherever situate,* is liable to estate duty.

(*b*) if the deceased was not so domiciled, his immovable and movable estate in Great Britain is liable to duty.

(*c*) with regard to settled property passing on the death of a person, the extent of the claim is governed by the proper law of the settlement. If it is English (or Scottish), the whole of the immovable property in Great Britain, and the movable property, wherever situate, is taxable; if not, only the property in Great Britain is liable to tax.

Thus, estate duty in Great Britain is based on the principles of situs and domicile, and in the case of settled property, the proper law of the settlement.

In regard to the location of assets for death duty purposes, if, under English or Scottish law, the property is situate in Great Britain, it is taxable; it is immaterial that it has some foreign attribute, or that by the law of a foreign country it is situate abroad.

Express provision for the relief from double taxation was made by s. 20(1) of the Finance Act, 1894, which provides that:

"Where the Commissioners [of Inland Revenue] are satisfied, that in a British possession to which this section applies, duty is payable by reason of a death in respect of any property situate in such possession and passing on such death, they shall allow a sum equal to the amount of that duty from the Estate duty payable in respect of that property on the same death."

Sub-section (2) provided that nothing in the Act should create a charge for estate duty on any property in a British possession, while so situate, or authorize the Commissioners to take any proceedings in such a possession for the recovery of any estate duty. It has, however, been held[14] that the British executors may require the Colonial executors to pay the excess of the British duty over the Colonial duty.

By sub-section (3), powers were conferred on the Crown, by Order in Council, to apply the section to any British possession where, by the law of such possession, either no duty is leviable in respect of property in the United Kingdom when passing on death, or where reciprocity is afforded in regard to duties leviable in the possession in respect of property in the United Kingdom. The section has been applied to more than forty British possessions,[15] and under the Foreign Jurisdiction Act, 1913, to certain protectorates and mandated territories. Similar arrangements exist between Great Britain, Eire and Northern Ireland. Thus, as between territories to which the section applies, relief from double taxation is complete, the burden being thrown on the country of domicile.

If reciprocity is to be accorded between countries, it is clearly necessary that the locality of assets should be determined according to a common set of rules, and it follows as a corollary to the conditions imposed by s. 20, that for the purposes of the section the situs of property should be determined in accordance with the law of Great Britain. Many complicated rules have been evolved for fiscal purposes.

S. 20 of the Finance Act, 1894, applies only to British possessions. A different principle was adopted in regard to foreign territories. S. 7(4) of the 1894 Act provides that where any property passing on death is situate in a foreign country, an allowance of the amount of the duty paid in such country in respect of that property should be made from its value. The relief conceded here, which, it may be noted, is not conditional on reciprocity, is incomplete, a small concession being made at the expense of the British Exchequer. The relief under the sub-section is in practice applied to British possessions to which benefit of s. 20 is not available.

[14] *Re Bullock-Webster, Royal Exchange Assurance* v. *Royal Trust of Canada,* [1936] Ch. 1.

[15] But there are some important exceptions, e.g., the section does not apply to Canadian federal death duties, nor to duties levied in the Union of South Africa.

In order to encourage foreign investors during the war of 1914-18 and the present war, certain British Government securities have been issued of which neither the capital nor the income is liable to taxation, present or future, so long as they are in the beneficial ownership of persons neither domiciled nor ordinarily resident in the United Kingdom. This concession cannot be regarded as a true instance of an arrangement for the avoidance of double taxation. It is merely a recognition of the principle that in making a foreign investment, the lender throws back on the borrower the burden of double taxation. He is only prepared to invest on such terms that the net yield satisfies his requirements.

Hitherto, therefore, the provisions in Great Britain for the relief from double taxation in regard to death duties have been incomplete, except in the case of British overseas territories. The Treaty[16] signed in Washington on April 16 last represents the first occasion on which arrangements have been made for the complete avoidance of double taxation with a foreign power.

The Convention applies to American federal estate tax, and to the estate duty imposed in Great Britain. The term "United States," when used in a geographical sense, means the States, the Territories of Alaska and Hawaii, and the District of Columbia. "Great Britain" means England, Scotland and Wales, but excludes the Isle of Man and the Channel Islands.

By Article III, the question whether the deceased was domiciled in any part of the territory of one of the Contracting Parties at the time of his death is to be determined in accordance with the law in force in that territory. The Article proceeds to define the situs of certain rights and interests, in cases where the deceased died domiciled in the territory of one of the contracting powers. Thus, rights or interests (otherwise than by way of security) in or over immovable property, and tangible movable property, currency, negotiable bills of exchange, etc., are, subject to exceptions, to be deemed situated at the place where such property is located. Debts and policy moneys are, in general, to be deemed to be situated where the deceased was domiciled; stocks and shares in a corporation (other than a municipal or governmental corporation) in the country of incorporation; ships and aircraft at the place of registration, etc. The situs of rights and interests not within the rules is to be determined according to the law relating to tax in force in the territory of the other Contracting Party, i.e., the territory in which the deceased was not domiciled.

Relief from double taxation is given by Article V. By clause (1), a Contracting Party which imposes tax on the grounds of domicile or nationality, is to allow against so much of its tax as is attributable to property in the territory of the other Contracting Party a credit equal to the amount of the tax payable in the country of situs, but such credit is not, of course, to exceed the amount of its own tax.

Clause (2) of Article V recognizes the possibility that each Contracting Party may claim that the deceased was domiciled in its territory. It provides that where each Contracting Party imposes tax by reason of a deceased person being domiciled in its territory, each Party is to allow against so much of its tax (as otherwise computed) as is attributable to property situated, or deemed to be situated, (*a*) in the territory of both Parties, or (*b*) outside both territories, a credit which bears the same proportion to the amount of its tax so attributable or to the amount of the other Party's tax attributable to the same property, whichever is the less, as the former bears to the sum of both amounts.

The effect of this provision is that credits are to be allowed in the two countries equal in the aggregate to the smaller of the amounts of duty which would otherwise have been payable. The credit in each country is to bear the same proportion to the smaller of these amounts, as its own tax bears to the total tax which would otherwise be payable in the two countries.

By Article VII the Parties agree to exchange information necessary for

[16] Cmd. 6625.

carrying out the provisions of the Convention, and for the prevention of legal avoidance. No information is to be exchanged which would disclose a trade secret or trade process.

Under Article VIII, each Contracting Party is given power to extend the application of the Convention to all or any of its colonies, overseas territories, protectorates or mandated territories.

As between the Contracting Parties, the Convention will come into force on the date of the exchange of instruments of ratification. It applies to the estates of persons dying after such date, and also to the estates of persons dying after December 31, 1944, whose personal representative elects, in a manner to be prescribed, that the Convention should be applied to such estate. The Convention is to operate for three years from its coming into force, and thereafter until determined.

With the conclusion of the Convention, arrangements now exist between most of the English speaking nations for the relief of double taxation, the burden of which may be very severe at the present time, owing to the high rates of taxation prevailing on account of the war. Lord Mansfield's dictum[17] that "no country ever takes notice of the Revenue laws of another" is a doubtful proposition in law; it is certainly no longer true in the field of economics and public administration.

COMPANY LAW OF GREAT BRITAIN

[*Contributed by* R. A. Lynex, Esq.]

On June 26, 1943, the President of the Board of Trade appointed a Committee, under the Chairmanship of Mr. Justice Cohen, "to consider and report what major amendments are desirable in the Companies Act, 1929, and, in particular, to review the requirements prescribed in regard to the formation and affairs of companies and the safeguards afforded for investors and for the public interest."

The report of the Committee is dated June 11, 1945, and the principal recommendations and opinions of the Committee expressed in it are summarized below. In this article, for ease of reference the recommendations are arranged according to their subject matter in approximately the same order as the relative sections of the Companies Act, 1929.

The following abbreviations are used:—

"para" means paragraph of the Committee's Report;

"section" abbreviated s. with number following means section of the Companies Act, 1929;

"the Act" means the Companies Act, 1929;

"Canada" means the Dominion of Canada Companies Act, 1934 (as amended to 1935);

"China 1931" means Chinese Company Law promulgated on December 26, 1929, and operative on and from July 1, 1931;

"China 1945" means Principles for Revised Company Law passed by the Chinese Supreme National Defence Council on June 18, 1945;

"India" means the Indian Companies Act, 1913 (as modified to March 30, 1942);

"New York" means New York Stock Corporation Law (Laws of 1909, Chapter 61, revised to June 20, 1939).

"Palestine" means the Palestine Companies Act, 1929 (as amended to 1936);

"South Africa" means the Union of South Africa Companies Act, 1926 (as amended to 1939);

[17] In *Holman* v. *Johnson*, Cowp. 343.

1. Shares of no par value (ss. 2(4) and 21).—These shares are not permitted in Great Britain, and the Committee refrains from recommending any change in the matter. There is little public demand for and considerable opposition to such shares in Great Britain, and their introduction might give an opportunity to the unscrupulous to manipulate accounts which could be defeated only by elaborate provisions (para. 18).[1]

2. Memorandum of Association (s. 5).—As regards third parties every company should have the same powers as an individual. The provisions of the memorandum of association as regards the powers of the company should operate as a contract between a company and its shareholders as to the powers exercisable by the directors, and should be alterable by special resolution without the sanction of the Court but with the consent of existing debenture-holders (if any) by extraordinary resolution (para. 12).[2]

3. Names of Companies (s. 17).—The Board of Trade should have unfettered discretion to refuse a name which they consider is calculated to mislead the public (para. 16).[3]

4. Private Companies (ss. 26, 110, 130, 133 and 139).—It would be impracticable, in order to prevent the formation of unsound private companies, to prohibit the formation of any private company with a paid-up capital of less than (say) £5,000, or to compel every private company on formation to deposit a substantial sum with the Board of Trade to be held as a reserve for payment of debts on winding-up (para. 57); nor is there sufficient reason, on the ground of hardship (for example, where legal representatives of minority shareholders have to raise money to pay death duties), to justify the removal of the restriction of the transfer of shares (para. 58); but with a view to strengthening the minority shareholders of a private company in resisting oppression by the majority, and remedying the abuse of directors receiving excessive remuneration for their services and thus leaving little or nothing for distribution among the shareholders, it is recommended that the Court should have an unfettered discretion to impose upon the parties to a dispute whatever settlement the Court considers just and equitable (paras. 59, 60 and 152).

With the annual return there should be filed the balance sheet and profit and loss acount of a private company, except where all the shares of the

[1] Shares of no par value were first authorized in the United States of America by New York State in 1912 (see New York, s. 12). Since that time, the Dominion of Canada (see Canada, s. 12) and all but three of the 48 States of U.S.A. have authorized their issue. Such shares are also permitted in other parts of the world. In U.S.A., although there is no uniformity in the matter of capital structure, the issue of both ordinary and preference shares of no par value, a prevalent practice for several years from 1920 onwards, is believed now to be losing favour.

The *labour shares* without nominal value, which a company incorporated in New Zealand may, unless expressly prohibited from so doing by its memorandum of association, issue to its employees (see New Zealand Companies Empowering Act, 1924, s. 59) are not shares in the sense here under consideration, as they do not form part of the capital of the company, although they may entitle the holders to attend and vote at meetings of shareholders, to share in the profits of the company, and to enjoy the privileges of other shareholders.

[2] This amounts to an extension of the principle of common form "objects and powers" clauses, which in some countries apply to every company unless otherwise provided by its memorandum of association; see Canada, s. 14(1), and Palestine, s. 6 and 2nd Schedule.

It is interesting to note that a trading company, having its head office outside and a licensed branch office within the Republic of China, may, with Chinese official approval, lease and purchase real property in China needed for its business, provided that under the law of that company's country of origin, Chinese companies enjoy the same rights (China, 1945, s. 21).

[3] Following South Africa, s. 10(2). cf. Palestine, s. 24(4), enabling the Court, on application, to restrain the use of a name likely to deceive except where prior right to use the name exists.

company are beneficially owned by the registered holders and none of the shares is beneficially owned by another company (para. 50 to 53).[4]

The shareholders and debentureholders in a private company should have the same right to receive copies of the company's accounts, including profit and loss account and auditors' report, as the shareholders in a public company (para. 54).

In view of the responsibilities and obligations placed upon directors under the Act, it should be provided that a private company must have at least one director—and also a secretary (paras. 55 and 174).[5]

Partners or employees of officers of a private company should not be permitted to be appointed auditors of the company (paras. 56 and 110).[6]

5. Execution of Deeds in Scotland (s. 29(4)).—A deed sealed with the common seal of the company and subscribed on behalf of the company either by any two directors or by any one director and the secretary should be held to be validly executed under the company's seal in Scotland and binding on the company, whether the subscription be attested by witnesses or not (para. 169).[7]

6. Prospectuses (ss. 34, 35, 37, 38, 94, 354 and 355, and 3rd, 4th and 5th Schedules).—S. 34 (dating and registration of prospectus) should apply to offers to existing members or debenture-holders (para. 25).

With every prospectus, not being an offer to existing members or debenture-holders, there should be delivered to the Registrar of Companies:—

(*a*) copy of every material contract (para. 31);

(*b*) statement by the auditors or accountants as to adjustments made by them in making their report pursuant to Part II of the 4th Schedule (para. 32); and

(*c*) the written consent of any expert, part of whose report is embodied in the prospectus (para. 38).

The penalties imposed by s. 34(5) should be extended.

S. 35 (specific requirements as to particulars in prospectus) should be so amended as to provide that:—

(*a*) every prospectus specifies the date, not less than two days after the first advertisement, on which the lists will be open (para. 27);

(*b*) all applications made pursuant to a prospectus shall be irrevocable for three days (para. 20); and

(*c*) no part of an expert's report shall be embodied in a prospectus without his written consent (para. 38).

Any application for permission to deal in the shares or securities should be made by the company within two days of the first advertisement; moneys received from subscribers should be paid to and kept in a separate account until permission to deal is granted or 21 days elapse from the closing of the lists, whichever first occurs; in the absence of permission to deal, allotments should be cancelled and moneys repaid forthwith without interest; and in respect of such repayment the directors should be under similar liability to that imposed by s. 39(4) (para. 28).

A statutory declaration that permission to deal has been granted or not refused before the expiration of 21 days from the closing of the lists should be a condition precedent to the commencement of business (para. 28).

[4] Under South Africa, s. 105(2), a private company, which becomes subsidiary to a public company, thereupon becomes converted into a public company, and must file a statement in lieu of prospectus within 14 days of its change of status.

[5] See also No. 26.

[6] See also No. 24.

[7] Following the decision in *Clydesdale Bank* (*Moor Place*) v. *Snodgrass* [1939] S.C. 805, where it was held that the signature of a company is the adhibition of its common seal in the manner prescribed by the articles of association and that the persons authorized to sign are the witnesses to the affixing of the seal, no attestation by further witnesses being necessary.

It should no longer be necessary to print the memorandum of association in the prospectus (para. 29); and the 4th Schedule (matters required to be stated in the prospectus) should be so amended as to show:—

(*a*) particulars of options on shares or debentures (para. 40);

(*b*) particulars of property transactions within two years (para. 30);

(*c*) particulars of payments to promoters within two years and the consideration therefor (para. 40);

(*d*) particulars of the expenses of the issue and by whom payable (para. 40);

(*e*) by whom the preliminary expenses are payable (para. 40);

(*f*) general nature of material contracts (para 31);

(*g*) facts, the omission of which would be misleading (para. 36);

(*h*) auditors' report as to profits or losses for last five years of the company (para. 32) and its subsidiary companies (para. 33), as to dividends paid by the company during the last five years (para. 32), and as to assets and liabilities of the company and its subsidiary companies (para. 37); and

(*i*) if the proceeds of the issue or any part thereof are to be applied in the purchase of a business or of shares in a company which is, or will by reason of such purchase become, a subsidiary company, a report by accountants as to profits or losses of the business or of the subsidiary company interest for last five years (para. 34), and as to assets and liabilities of that business or subsidiary company and its own subsidiary companies (para. 37).

S. 38 (document containing offer of shares or debentures for sale to be deemed a prospectus) should be amended to cover "placings" through stockbrokers and others which amount to offers to the public (para 22).[8]

The 3rd Schedule and the forms of statement in lieu of prospectus in the 3rd and 5th Schedules should be amended in accordance with the suggested amendment of the 4th Schedule.

There should be delivered to the Registrar of Companies under s. 354:—

(*a*) certified copy of any prospectus distributed in Great Britain offering shares or debentures of a company incorporated outside Great Britain;

(*b*) copy of every material contract;

(*c*) statement by the auditors or accountants as to adjustments; and

(*d*) written consent of any expert, part of whose report is embodied in such prospectus (para 40).

It should be made clear that s. 355 (requirements as to prospectus) is not to apply to offers to existing members or debenture-holders, and other minor amendments should be made in that section (para. 40).

S. 37 (liability for statements in prospectus) should be so amended as to provide that:—

(*a*) civil liability extends to misleading as well as to false statements (para. 42);

(*b*) experts, who consent to the embodiment of part of their reports in the prospectus, are liable (para. 44);

(*c*) onus is on the defendant to establish that he had reasonable ground for relying on the expert (para 43);

(*d*) right to contribution extends to experts (para 45);

(*e*) there shall be no allotment if the expert withdraws his consent beforehand; and

(*f*) onus is on the director signing a false prospectus to establish that he did not and could not reasonably know that the statement was false (para. 41).

7. Acquisition of Shares of Company Either by Itself or by its Subsidiary Company.—S. 45 (prohibiting a company from providing financial assistance for the purchase of its own shares, with an exception in favour of employees) should

[8] The expression "to the public" has not been defined by statute in Great Britain. In Canada, s. 82 (restrictions on offering shares for subscription), the word "public" does not include "close personal friends, business associates or customers with whom the person making the offer has been in the habit of doing regular business in the sale of or obtaining subscriptions for securities in the past."

be so amended as to prohibit a company from providing money to assist a subscription for its own shares or of those of its holding company and from buying or providing financial assistance for the purchase of the shares of its holding company (para. 170).[9]

Shares of a holding company held by subsidiary companies should have no voting rights, except where the subsidiary company holds as trustee otherwise than on behalf of the holding company or one of its subsidiary companies (para. 170).[10]

8. Redeemable Preference Shares (s. 46).—Shares redeemed under s. 46 should be deemed to be part of the authorized capital unless and until new shares are issued in their place (para. 171).

9. Variation of Shareholders' Rights (s. 61).—Dissenting shareholders should have 21 days, instead of seven days, in which to apply to the Court under s. 61 to have the variation cancelled (para. 138).

10. Nominee Shareholdings (s. 101).—Nominee shareholdings should not be prohibited, because the system serves useful and legitimate purposes (para. 78), and is consonant with the wide-spread use of bearer securities in Europe which is permitted in Great Britain and should continue (paras. 77 and 83),[11] but nominee shareholdings should be distinguishable from other shareholdings in the register (para. 81). Therefore:—

(*a*) every transfer should contain a declaration by the transferee as to whether he will hold as beneficial owner (widely defined—para. 82) or as nominee (para. 81);

(*b*) every existing shareholder, who has not made such a declaration as transferee, should sign and deliver to the company within two months of the coming-into-force of the new Act, a similar form (to be sent out by the company with the notice of the next ordinary general meeting) and should notify any change in the particulars to the company; and when issuing notices of future ordinary general meetings, the company should draw the attention of its shareholders to these obligations (para 81);

(*c*) every beneficial owner of one per cent. or more of the capital of a company or class of shares in a company should file a declaration of such ownership within two months of the coming-into-force of the new Act, or within ten days of becoming such beneficial owner, and should notify any change to the company; and these provisions should apply to bearer shares as a deterrent although detection of a breach would be difficult (para. 82);

(*d*) the information derived from these declarations should be entered in a book available for inspection, and particulars should be filed with the annual return (para. 82);

(*e*) the penalties for false declarations should be severe, i.e., six months' imprisonment or £500 fine or both (para. 82);

(*f*) these provisions should not extend to debentures (para. 82);

[9] Similar prohibitions against buying shares are contained in India, s. 54 A(1), and South Africa, s. 86 *bis*. In *V.G.M. Holdings Ltd.* [1942] Ch. 235 it was held that s. 45 does not prohibit a company from giving financial assistance for the subscription of its own shares.

[10] In China, a company may hold shares in another company if the businesses are related, but the amount of the investment may not exceed one half of the paid-up capital of the investing company, except in the case of an investment company or where the investment is in a "productive enterprise" (China, 1945, s. 2). Under China, 1931, s. 11, there was a plain limitation of the investment by one company in shares of any other company to one fourth of the paid-up capital of the investing company.

[11] Under China, 1931, s. 118, the number of bearer shares which a company might issue was limited to one third of its total issued capital. That limit has now been raised to one half (China, 1945, s. 13).

(*g*) the Board of Trade should have power in the public interest to investigate the beneficial ownership and control of a company by appointing an inspector with wide powers (paras. 84 and 85); and

(*h*) the Board of Trade should have power in the public interest to direct a company not to pay dividends on or permit the exercise of rights attached to certain shares until the Board of Trade otherwise directs (para. 85).

11. Certification of Transfers.—A company should be responsible for the statements of its authorized agents, even though no share certificate has been lodged, but should not warrant the title or the validity of the documents. Certification of a transfer should amount to a representation by the company that the transferor has produced to the company documents showing a *prima facie* title in the transferor to transfer the shares (para. 139)[12]

12. Trustees for Debenture-Holders are not officers of the company, and no provisions in the Act affect them. The position is unsatisfactory as the use of the term " trustee " may lead debenture-holders to believe that their protection is more effective than is the fact (para. 61).

Individual trustees should still be permitted as well as corporate trustees (para. 62).

Legislation on the subject of trustees with conflicting interests is not recommended, as an absolute prohibition from acting in such a case might interfere unduly with practical arrangements, and it would not be practicable to set forth in legislation all the exceptions which would be desirable to an absolute prohibition (para. 63).

A general provision in a trust deed for exempting trustees from liability should be prohibited but enabling clauses as distinct from indemnity clauses should be permitted; and in determining whether there has been a breach of duty by trustees for debenture-holders, regard should be had to the enabling clauses (para. 64).

13. Registration of Charges (ss. 79 to 91).—To remove all possibility of evasion, it should be declared that the provisions of the Act in regard to registration of charges apply to the case of a trustee who holds property for a company and gives a charge over that property (para. 71).

14. Publication of Name by Company (s. 93).—It should no longer be necessary for the name of a company to appear in its advertisements, but the name should be shown on the business letters of the company—a category of document which may not fall within the existing term " official publications," with the result that certain companies have been in the habit of trading under other names than their registered names without revealing the latter in their business letters (para. 172).

15. Registers of Members and Debenture Holders and Annual Return (ss. 73, 82, 88, 95, 96, 98, 108, 110 and 112).—A company should no longer be required to make an annual return in the calendar year of its incorporation.[13] The first return should be made within 28 days of the first ordinary general meeting which should be required to be held within 15 months of incorporation (paras. 73 and 129).[14]

Thereafter the company should only be required to file a complete return

[12] This recommendation means that the law should be as laid down in *Bishop* v. *Balkis Consolidated Company* (1890) 25 Q B.D. 512, a decision the value of which was negatived by the decisions of the House of Lords in *Whitechurch (George) Ltd.* v. *Cavanage* [1902], A.C. 117 and *Kleinwort Sons & Company* v. *Associated Automatic Machine Corporation Ltd.* (1934) 50 T.L.R. 244.

[13] Following India, s. 32(1), and South Africa, s. 26(1).

[14] This principle is recognized in Canada, s. 97, India, s. 76(1), and South Africa, s. 59(1). See also No. 16.

every third year, with the option of filing only a list of changes in membership for each of the intervening two years (para. 73).[15]

The practice of giving in the return information as to the occupations of members should be discontinued (para. 73).

The company should no longer be required to keep the annual return in its register of members (para. 73).[16]

The register of members should no longer be required to be kept at the registered office; it should be permissible to keep it at the office of any independent registrar, transfer agent, or other person to whom the company has delegated its registration work,[17] but any change in the place at which it is kept should be notified to the Registrar of Companies (para. 74).

To remove all doubt it should be made clear that the company is under obligation to keep a register of debenture-holders,[18] and it should be provided that, as recommended in the case of the register of members, the register of debenture-holders may be kept at the office of an independent registrar, any change being notified to the Registrar of Companies (para. 75).

It should not be necessary in the case of companies incorporated in Scotland to include in the annual return, under s. 108(3) (*o*), indebtedness in respect of mortgages and charges which do not constitute a valid charge according to the law of Scotland (para. 76).

16. Meetings (ss. 112, 113, 115 and 117).—It should be provided that, notwithstanding anything in the memorandum or articles of association to the contrary, the required notice of meetings should be as follows (para. 126):—

Ordinary general meetings: 21 days' notice,[19] unless all members entitled to attend and vote agree to shorter notice.

Other general meetings: 14 days' notice,[19] unless a majority in number of members holding 95 per cent. of capital giving a right to attend and vote agree to shorter notice, and except that a special resolution shall still need 21 days' notice under s. 117.

It would not be practicable to lay down by statute the places and times at which, on the ground of inconvenience to shareholders, a company should not hold a meeting (para. 127).

Shareholders should be empowered to introduce resolutions at ordinary general meetings as follows (para. 128):—

(*a*) Proposers: 100 members holding on the average £100 paid-up capital per member, or members holding 5 per cent. of the shares carrying voting rights;

(*b*) Notice: 35 days before the meeting. The company should send out the notices, together with a supporting statement not exceeding 1,000 words, if required by the proposers.

A company should also be under obligation to distribute, on like request, a statement limited to 1,000 words on any matter pending before any general meeting, provided that the statement is delivered to the company within seven

[15] Following war-time legislation in New South Wales (relating to any companies with a membership exceeding 200); similar relaxations were also made in Victoria and New Zealand. In Great Britain, under S.R. & O., 1942, No. 803, the annual return of a public company (other than its first) need not contain the information as to present and past members and the shares held or transferred by them specified in s. 108(1) and (2) of the Act.

[16] This recommendation is in accordance with war-time practice under S.R. & O.s, 1940, Nos. 1213 and 1687.

[17] A similar provision is contained in New York, s. 12.

[18] There is no such specific obligation in the Act (although s. 73 provides that every such register shall be open to inspection by registered debenture-holders, and s. 88(1) provides that the register of charges, which is to be kept at the registered office, shall give the names of the persons entitled to a charge, except in the case of securities to bearer). cf. South Africa, s. 92(1), which specifically imposes the obligation.

[19] China, 1931, s. 134, provides for one month's notice of ordinary general meetings. India, s. 79, provides for 14 days' notice of all general meetings, notwithstanding anything in the articles of association to the contrary.

days after service of the notice convening the meeting, the shareholders being required to pay in advance the reasonable cost of printing, with power for the company to authorize a refund thereof (para. 128).

The first ordinary general meeting should be held any time within 15 months of incorporation instead of in the calendar year of incorporation (para. 129).[20]

In default of the company, the Board of Trade in lieu of the Court should have power to direct the calling of an ordinary general meeting under s. 112(3) (para. 129).

The Court should have power to direct that one shareholder can constitute a quorum for the purposes of s. 115(2) (para. 129).[21]

It should be made clear that a special or extraordinary resolution signed in writing by all the members before the date on which the resolution is to come into operation is valid (para. 129).

17. Proxies.—The "two-way" proxy stipulated for by the London Stock Exchange Committee (which is in effect a system of voting by referendum, because under it a shareholder or debenture-holder votes either for or against resolutions other than those of a purely routine nature) is regarded as a practical move towards giving greater reality to control by shareholders over directors, but should be left to the regulations of the London Stock Exchange Committee (para. 132).

Directors should not be permitted to issue at the expense of the company forms of proxy to certain members only (para. 132).

Notwithstanding anything in the articles of association to the contrary, a proxy should not be required to be a shareholder, except in the case of a company limited by guarantee without share capital (para. 133).

Notice of a general meeting, except in the case of a company limited by guarantee without share capital, should remind shareholders of their right to appoint proxies, whether shareholders or not (para. 133).

48 hours before the meeting should be the maximum time limit for handing in proxies (para. 134).

A shareholder, either in completing a proxy form or in voting himself on a poll, should not be required to cast all his votes one way (para. 135).[22]

18. Polls (s. 117(4)).—It should be provided that, except in the case of a company limited by guarantee without share capital, a poll may be demanded on any resolution, other than for adjournment of the meeting, by or on behalf of any five members, or the holders of not less than one-tenth of the paid-up share capital carrying the right to vote at the meeting, or the members representing not less than one-tenth of the total voting rights, a proxy having the right to join in demanding a poll (para. 136).[23]

19. Loose-leaf Registers, Books, and Accounting Records (ss. 95, 120 and 122).—The use of labour saving methods is regarded as desirable. For the

[20] This principle is recognized in Canada, s. 97, India, s. 76(1), and South Africa, s. 59(1). See also No. 15.

[21] The word "meeting" *prima facie* means a coming together of more than one person; but it is possible to show that the word "meeting" has a meaning different from the ordinary meaning (*Sharp* v. *Dawes* (1876) 2 Q.B.D. 26). As regards board meetings, which are matter of internal management, there are grounds for supposing that a quorum of one and a committee of one might be effectively constituted (see *Re Fireproof Doors Ltd.* [1916], 2 Ch. 142: "But though it is not true that one shareholder cannot constitute a meeting—*Sharp* v. *Dawes*—it is not clear that one director cannot form a quorum of a board of two and it is quite clear on the authorities that there may be a delegation to a committee of one under Article 91 of Table A, per Astbury, J.").

[22] A nominee may hold shares on behalf of more than one beneficial owner of whom some may require him to vote for the proposals, while others may require him to vote against the proposals. In practice he usually carries out these instructions, but such a division of voting is of doubtful validity, and the recommendation aims at legalizing the practice.

[23] A similar provision is contained in India, s. 79.

purposes of the Act registers and books should be deemed to include loose-leaf registers and books and accounting records not kept in books, providing reasonable precautions are taken against their misuse (para. 173).[24]

20. Accounts (ss. 123 and 124).—Standard forms are regarded as of doubtful practicability, but it is considered that a prescribed minimum of information would strengthen the position of auditors (para. 97).

The *Balance Sheet* should give a true and fair view of the state of affairs of the company,[25] and should show or distinguish the following items (paras. 98, 99, 100 and 101):—

Current assets (defined as cash, and assets held for conversion into cash).

Fixed assets (defined as assets not held for sale or conversion), the following being shown separately where ascertainable:—

Cost; and

Depreciation (exemption in favour of public utility undertakings).

Goodwill, patents and trade marks are fixed assets and may be shown as an aggregate.

Investments in subsidiary companies.

Other trade investments.

Other quoted investments.

Other unquoted investments.

Debentures of the company held by the company.

Premiums on share capital.

Aggregate of capital reserves,[26] if material (defined).

Aggregate of other reserves,[26] if material.

Aggregate of provisions to meet special contingencies, if material; need not be shown separately if the Board of Trade agree, on the ground of prejudice to the company or not being necessary in the public interest.

Bank loans and overdrafts.

Net amount of dividends recommended.

Additions to reserves, if material, showing amounts, sources, and manner of use.

The following matters should be dealt with by way of note on or annexed to the *Balance Sheet*:—

Current assets without realizable value.

Basis of conversion of foreign currency assets or liabilities.

General nature and amount of contingent liabilities not provided for in the Balance Sheet.

Gross amount of fixed dividend arrears.

Particulars of options over share capital of the company.

Capital expenditure commitments not provided for in the Balance Sheet.

Basis of provision for United Kingdom income tax.

Aggregate of shares and debentures of the company held by subsidiary companies.

Corresponding figures of the last preceding Balance Sheet.

Banking, discount, and assurance companies, as designated by the Board of Trade, should be exempted from complying with certain requirements as to *Balance Sheets* (para. 101).

[24] For example, arrangements for the proper custody of the keys of loose-leaf books and of the loose leaves themselves and for typing of the leaves in such ways as to minimize the risk of additional pages being wrongfully inserted.

[25] These recommendations go much further than the accounting provisions contained in South Africa, ss. 90 *bis*, 90 *quat* and 90 *quin*, which themselves cover a wider field than present requirements under the Act.

[26] In China (under China, 1931, s. 170) a company, before allocating profits for dividend purposes, had first to set aside ten per cent. of its profits as a reserve fund until that fund reached an amount equal to one-half of the company's capital. That allocation to reserve has now been increased to twenty per cent. of profits until the reserve fund equals the total capital (China, 1945, s.9).

The *Profit and Loss Account* or Income and Expenditure Account should give a true and fair indication of earnings or income,[27] and should disclose the following items (paras. 90, 92, 93, 96 and 103):—

Exceptional or non-recurrent transactions.

Any material change in the basis of calculation.

Net profit, income, loss, or expenditure.

Depreciation of fixed assets.

Interest on debentures and other fixed loans.

United Kingdom taxation on profits, sub-divided where practicable.

Redemption of share and loan capital.

Aggregate of amounts, if material, set aside to reserves.

Aggregate of amounts, if material, set aside to meet specific contingencies; need not be shown separately if the Board of Trade agree, on the ground of prejudice to the company or not being necessary in the public interest.

Income, less provisions for losses, from subsidiary companies.

Income from other trade investments.

Income from other investments.

Aggregate of withdrawals, if material, from reserves.

Aggregate of withdrawals, if material, from provisions to meet specific contingencies.

Profits or losses of an exceptional or non-recurrent nature.

Dividends paid or proposed, disclosing whether tax deducted or not.

The following matters should be dealt with in or by way of note on the *Profit and Loss Account* or Income and Expenditure Account:—

Directors' emoluments, i.e., aggregate of fees, aggregate of other remuneration including expenses allowances not in reimbursement of expenses actually incurred, and aggregate of pension contributions.

Aggregate of amounts paid to directors, as such or otherwise, in connection with retirement, showing separately the amounts paid by the company, other companies, and any other persons.

Aggregate of directors' pensions paid by the company and other companies separately, except pensions under a scheme under which the company's contributions would be directors' emoluments.

Corresponding figures of the last preceding Profit and Loss Account or Income and Expenditure Account.

Banking, discount, and assurance companies, as designated by the Board of Trade, should be exempted from complying with certain requirements as to *Profit and Loss Accounts* and Income and Expenditure Accounts (para. 103).

The *Profit and Loss Account* or Income and Expenditure Account should be signed by directors in the same way as the Balance Sheet under s. 129(1), and should be annexed to the Balance Sheet (para. 106).

The Board of Trade should have power to amend forms under the *Assurance Companies Act, 1909* (para. 102).

Statutory requirements as to *Accounts* should be subject to modification by statutory order in order to embody up-to-date practice (para. 104).

The issue to the shareholders of a report of the proceedings at the ordinary general meeting and the Chairman's speech thereat is regarded as a commendable practice. The directors' report should be informative, but no statutory provisions as to its contents are recommended (para. 105).

The annual *Accounts* should be circulated (s. 130) to all shareholders and debenture-holders, whether entitled or not to receive notices, not less than 21 days before the ordinary general meeting (para 107).

It should be left to the London Stock Exchange Committee to control

[27] These recommendations, as in the case of the Balance Sheet, extend the example set by South Africa, ss. 90 *bis* and 90 *ter*, which themselves are an advance upon present requirements under the Act.

whether a company should be required to issue, at the same time as any declaration of dividend, a statement of profits for the corresponding period in order to prevent the creation of a false market in the shares (para. 175).

21. Share Premiums should be subject to the provisions relating to capital reduction (ss. 55 to 60), and should not be available for dividend, but should be permitted to be used in paying up unissued shares to be issued to members (para. 108).

22. Books of Account should be kept (s. 122) as necessary to exhibit a true and fair view and to explain the company's transactions.[28] Companies carrying on business outside Great Britain should keep in Great Britain adequate information as to their foreign branches (para. 109).

23. Holding and Subsidiary Companies (ss. 125, 126 and 127).—A holding company's published accounting information should include, as far as reasonably practicable, information about the financial position and results of the group as a whole (para. 117).

The *definition "subsidiary company"* should include sub-subsidiaries, but should exclude companies which are neither under the holding company's *de facto* control as regards management nor subject to its legal power of control as regards appointment of a majority of the directors. Control[29] should be recognized as the decisive factor, as it is in U.S.A. and Canada, and the holding of more than one-half of the equity (defined) should be regarded as giving control, as it does in practice, without a majority of the voting power (para 118).[30]

The accounts of subsidiary companies should, so far as practicable, be *consolidated* with and made up to the same date as those of the holding company, excluding the accounts of subsidiaries which in the opinion of the holding company's directors it should be impracticable or misleading to consolidate (paras. 119, 120 and 122))[31]

The Board of Trade should have power to exempt any banking, discount, or assurance company, where it would be inappropriate to consolidate the accounts (para. 120).

The *Consolidated Accounts* of an assurance company, when required, should be deposited with the Board of Trade (para. 63).

There should be annexed to the Balance Sheet a directors' statement of the reasons why it is impracticable to make up all the accounts to the same date and why it would be impracticable or misleading to include the excluded company (para. 122).

The net aggregate of profits or losses of excluded subsidiary companies should be shown in a directors' statement, together with particulars of any qualifica-

[28] Following South Africa, s. 90(1).

[29] An interesting definition of "control of a company" is contained in the Finance Act, 1940, s. 55(3).

[30] A note about the former status in Germany of companies under Jewish control may be of interest. By the 3rd Decree under the Reichs Citizen Law dated June 16, 1938, a company was treated as a Jewish concern (*a*) if one or several persons nominated for legal representation, or one or several members of the Board, were Jews, or (*b*) if Jews had a deciding participation by virtue of capital (i.e., a 25 per cent. holding) or voting rights (i.e., half of the total number of votes). If on January 1, 1938, one or several members of the board or management committee were Jews, it was assumed that Jews had a deciding holding by virtue of capital or voting rights. A branch of a non-Jewish concern was regarded as a Jewish concern if the manager or one of several managers of that branch was a Jew. The test was:— one Jewish member of the board, or one Jewish managing official, or 25 per cent. of the capital or half the voting rights controlled by Jews, made the concern Jewish.

[31] S. 125 of Victoria Companies Act, 1938, requires a parent company either to publish consolidated acounts or to annex to its own accounts a balance sheet and profit and loss account for each subsidiary company. In the case of a subsidiary company incorporated outside Victoria, a profit and loss account and balance sheet, drawn up in accordance with the law of the state or country in which the subsidiary company is incorporated, is sufficient compliance with that Act.

tions in auditors' reports on excluded subsidiary companies' accounts. That statement should be regarded as part of the accounts on which the auditors report (para. 122).

Statutory requirements as to *Consolidated Accounts* should be subject to modification by statutory order to embody up-to-date practice (104).

Consolidated Accounts should be signed by the directors who sign the accounts of the holding company, and the statement annexed to the Consolidated Accounts or to the accounts of the holding company should be deemed to be part of the annual accounts.

The Board of Trade should have power to adapt the statutory requirements as to Consolidated Accounts to the circumstances of particular companies (para 121).

A subsidiary company should disclose in its Balance Sheet the total indebtedness between it and other companies in the group.

Pre-acquisition profits and losses of subsidiary companies should not be brought into the holding company's accounts as revenue profits and losses, but should be calculated by apportionment to the date of acquisition (para. 123).

24. Auditors (ss. 132, 133 and 134). Qualification (s. 133).—Only members of societies designated and other persons authorized by the Board of Trade should be qualified to act as auditors of companies (para. 110).[32] The following should be disqualified (para. 110):—

an employee of the company;

an employee or partner of (i) a director, (ii) another officer, or (iii) an employee of the company, whether public or private;[33]

any person ineligible as auditor of one company from being auditor of another company in the same group.

Appointment (s. 132).—If no auditors are appointed, the company should inform the Board of Trade who should then appoint auditors. The Board of Trade should also have power to appoint, whether they have received an application from a member under s. 132(2) or not (para. 111).

Right to Attend General Meetings (s. 134).—Auditors should have the right to receive notice of and attend all general meetings, and, if there is a proposal not to reappoint them or other auditors have been nominated, the right to put their views orally or in writing to the shareholders (para. 112).

Remuneration (s. 132).—The company in general meeting should have power to authorize the board to fix the auditors' remuneration, which in that case should be shown separately in the accounts (para. 113).

Report (s. 134).—The auditors should report on the Profit and Loss Account as well as on the Balance Sheet, and the report should state whether proper books of account have been kept, whether the branch returns are adequate, and whether there are good reasons for not presenting consolidated accounts (para. 114).

25. Investigation of Affairs (ss. 135, 136 and 137).—The applicants for an investigation by Board of Trade inspectors should not have to establish that they are not actuated by malicious motives (para. 156).

The basis of application (one-tenth of the issued capital) should now apply to banks and other companies, and to meet difficulties in the case of a large

[32] In India, the qualification of the auditor of a public company is the holding of a certificate from the Governor General in Council entitling him to act as an auditor of companies, or in the case of a firm acting as auditors, the holding of such a certificate by every partner (India, s. 144(1)). In Palestine, the qualification is membership of some society of accountants or auditors approved by the High Commissioner, or the holding of a certificate from the Government of Palestine or from some university or other institution approved by the High Commissioner (Palestine, s. 105(4)). In China, the auditor must be a shareholder selected by the shareholders in general meeting (China, 1931, s. 152).

[33] See also No. 4.

company, should include an application by any 200 members of the company (para. 156).

The Board of Trade should have power to appoint an inspector on their own initiative,[34] if there is reasonable ground for suspecting fraud, misfeasance, breach of duty, or oppression of a minority, or if it is in the public interest, or if requested by the Court (para. 156).

An inspector should have power to apply to the Court for examination on oath of persons concerned, and power to extend the investigation to subsidiary companies (para. 156).

The inspector's report should be available to shareholders and to creditors, if affected (para. 157).

The Board of Trade should have power to apply to the Court for a winding-up order or to bring proceedings for the recovery of money (para. 157).[35]

Costs should be provided for as follows (paras. 157 and 158):—

Power for Court to order payment by an unsuccessful defendant of the costs of proceedings and of the investigation.

Board of Trade pay, if application for winding-up order dismissed.

Board of Trade ordinarily pay, if they initiate investigation.

If members apply, company pays unless applicants or Board of Trade or both pay, as decided by Board of Trade.

If prosecution results, Board of Trade pay investigation costs unless persons successfully prosecuted pay.

Board of Trade power to require security for costs up to £100 should be sparingly used.

To remove doubt about s. 135, it should be stated to be the duty of all officers and agents of the company, past and present, to give all assistance to inspectors (para. 159).

The power under s. 137 for the company to appoint inspectors by special resolution should be repealed. As an alternative, the Board of Trade should appoint an inspector if the company by special resolution so resolves (para. 160).

26. Directors and Secretaries (ss. 139 and 140).—Every company should have at least one secretary,[36] and every private company should have at least one director (paras. 55 and 174).[37]

Resolutions for the election of directors should be submitted in respect of each director separately, unless the meeting otherwise resolves without dissent (para. 130).

[34] Following Victoria Companies (Special Investigation) Act, 1940.

[35] Under Victoria Companies (Special Investigation) Act, 1940, proceedings may be stayed during an investigation, and the Court may order the winding-up of any company on the petition of the Attorney General at any time after a report has been made by inspectors.

[36] Although specific authority is conferred by the Act upon the secretary of a company in respect of various matters (ss. 15(2), 33, 94(1) (*c*), 111, 129(2), 181(2) and 234(6)) and he is mentioned many times elsewhere in the Act either specifically or by inclusion in the expression " officer," the only implications in the Act that there must be a secretary are:—

(*a*) in the case of a public company, the statutory report must state " the names, addresses, and descriptions of the directors, auditors, if any, managers, if any, and secretary of the company " (s. 113(3) (*d*));

(*b*) the sealing of a deed, which is required to be held in Scotland to have been validly executed, needs apparently attestation by the secretary of the company (s. 29(4)). See also No. 5.

[37] See also No. 4. Every public company incorporated after 1929 must already have at least two directors, but there is no explicit provision in the Act that a private company must have even one director. In India, a private subsidiary company of a public company must have three directors, as if it were a public company (India, s. 83A). The usefulness of a limited company acting as director of another company in the same group was put to the Committee in evidence; and as the report is silent on that point, it may be assumed that the Committee's view is that there is no objection to the practice. In China, a company may be the director or supervisor of another company but must appoint a natural person as its representative (China, 1945, s. 3).

Irrespective of anything in the articles of association to the contrary, all directors, whether under service contract or not, should be removable by ordinary resolution, except only existing permanent directors of private companies (para. 130).

Every director of a public company should retire at the age fixed by the articles of association and should not be eligible for re-election.[38] If no such age is fixed, he should retire at the first ordinary general meeting after he attains the age of 70 years, but it should be permissible for him to be retained with the authority of a special resolution (para. 131). To avoid inconvenience, existing directors of public companies should not need to retire on the ground of age until they become due to retire under the articles of association of their respective companies. To prevent abuse, contracts made after June 11, 1945, should have effect as if they provided for retirement at the retiring age, unless otherwise provided by special resolution (para. 131).

27. Financial Relations Between Companies and Their Directors (ss. 128, 148, 149 and 150).—The Committee do not recommend a prohibition on directors holding shares in the names of nominees (para. 86).

Directors should disclose to their boards all their transactions in the shares or debentures of their companies or subsidiary companies;[39] the book in which all such transactions are recorded should be open to inspection by the Board of Trade at any time and by any member or debenture-holder 14 days before the ordinary general meeting (para. 87).

Tax-free directors' fees and salaries should be prohibited (para. 88).

As already mentioned,[40] the following amounts should be separately disclosed in the company's accounts (para. 90):—

Aggregate of directors' fees.

Aggregate of directors' other remuneration, including expenses allowances not in reimbursement of expenses actually incurred.

The figures for each director should not be separately disclosed; nor should the aggregate remuneration of staff members, each in receipt of salary over (say) a fixed amount, be disclosed, as the staff, unlike the directors, do not fix their own remuneration (para. 90).

The remuneration of managing firms, managing agents and managing secretaries would be disclosed only if they exercised the functions of the board of directors (para. 91).

No compensation as consideration for or in connection with retirement from the office of director should be paid by a company to any of its directors without the approval of the company in general meeting (para. 92).

No benefit or advantage in connection with an offer for the acquisition of the shares or undertaking of a company should, within a period of one year before or two years after the acceptance of the offer, be received and retained by a director without the approval of the company in general meeting, or of separate general meetings of the holders of each class of share to which the offer applies, as the case may be (para 92).

As already mentioned,[40] the following amounts should be separately disclosed in the company's accounts:—

Aggregate of payments by way of compensation for loss of office as director (para. 92).

Aggregate of payments to directors as compensation for or in connection with the giving up of offices other than that of director (para 93).

Aggregate of pensions and like benefits paid by the company to any of its directors or former directors, excluding pensions paid under a scheme (para. 93).

Loans by a company or any of its subsidiary companies to a director of

[38] A company is thus able to make its own arrangements in this matter.
[39] Following Canada, s. 96A.
[40] See No. 20.

either should be prohibited, except in the case of companies whose business is money-lending (para. 94).[41]

A general prohibition against directors voting on contracts in which they are interested would be impracticable, particularly in view of the likelihood of a quorum of disinterested directors frequently being unavailable;[42] but as a general rule directors should disclose to shareholders in the directors' report contracts of any magnitude in which they are interested. Written notice of disclosure under s. 149(3) should be deemed to be part of the proceedings of the directors' meeting (para 95).[43]

28.—Amalgamation, Arrangements, and Reconstructions (ss. 153 and 155).—An explanatory circular about an arrangement or compromise under s. 153 should be issued with the notice of the meeting, indicating the directors' interests in the matter (para. 140).

The procedure to acquire minority interests under s. 155 should cover the case of the transferee company already holding over one-tenth of the shares affected, provided the offer is made to all other holders than the company itself and is accepted by not less than 75 per cent. holding not less than 90 per cent. of the shares to be acquired (para 141).

A minority should have power to require the company to acquire their interests under s. 155 (para. 141).

Shares of a dissenting shareholder under s. 155 should be transferred to the transferee company, the transferor company having power to execute a transfer on behalf of the dissenting shareholder (para. 141).

29. Winding-up. Declarations of Solvency (s. 230) have served a useful purpose (para. 143); but every such declaration should have limited validity, i.e., it should be made before, but within 35 days of, the meeting at which the resolution to wind up is passed (para. 144).

Every declaration of solvency should be accompanied by a statement of affairs estimating the assets and liabilities (para. 144).

In a members' voluntary winding-up, the liquidator should summon a creditors' meeting if he thinks the declaration is unlikely to be fulfilled or if the debts are not paid within a year of the beginning of the winding-up (para. 144).

If the debts are not paid within a year, the directors making the declaration should be criminally liable in the absence of reasonable grounds for making it (para. 145).

Fraudulent Preference (s. 265).—Transactions taking place within six months before the beginning of the winding-up, instead of three months, should be impeachable, provided a corresponding change were made in English bankruptcy law (para. 146).

Where cheques are paid by a company into its bank account within three months before the beginning of the winding-up, and the liquidator establishes fraudulent preference in favour of a surety, the bank, as the party to whom payment has been made, should still be obliged to refund, but should have a right of recourse to the surety; this amendment should apply to bankruptcy as well as to winding-up (para. 147).

[41] Under India, s. 86D, directors are prohibited from receiving loans from their companies. Canada, s. 15, prohibits loans by a company to its shareholders as well as to its directors.

S. 45(1) of the Act (prohibition of provision of financial assistance by company for purchase of its own shares) is the same as s. 16(1) of the Companies Act, 1928; but the Act did not embody s. 16(2) of the earlier Act, which is as follows:—

"Nothing in proviso (*c*) to sub-section (1) of this section shall render lawful the making of a loan to a person who is a director of the company."

[42] In India, such a prohibition exists in the case of directors of a public company (India, s. 91B).

[43] India, s. 91A, (which follows s. 149 of the Act) also provides that the company shall keep, for inspection by its members, a register of particulars of all company contracts in which any director of the company is directly or indirectly concerned or interested (with a fine for contravention).

Floating Charges (s. 266) created within 21 months before the beginning of the winding-up, instead of six months, should be voidable (para. 148).

Liability for Debts in Case of Fraud (s. 275).—Other persons than directors, knowingly parties to fraud, should be personally responsible. The penalty should be increased from one year's to two years' imprisonment (para. 149).

Disqualification of Officers (s. 275).—In the course of a winding-up, the Court should have power to disqualify for a period up to five years any officer of the company who commits misfeasance in the discharge of his duty, apart from fraudulent management; and power to disqualify from taking part in management for such period as the Court thinks fit any person it convicts of a " company " offence (para. 150).

Settlement.—The Court should have power to order a settlement if a winding-up order would not do justice (paras 60 and 152).

Preferential Debts (s. 264).—All wages or salaries not exceeding £100 in respect of services rendered to the company during four months next before the winding-up order or the beginning of the winding-up, as the case may be, should rank as preferential debts (para. 153)[44]

Offences (s. 271).—The following should be offences (para. 153):—

Failure to account for moneys received.

Payment or offer of inducement to a creditor or shareholder to vote for the nomination of a particular liquidator.

30. Prosecutions.—A prosecution should lie under s. 274 for failure to keep proper books, even if the company is wound up within two years of incorporation (para. 153).

In order to prevent persons from escaping prosecution, it should be provided that the Director of Public Prosecutions or the Lord Advocate need not be satisfied, before instituting proceedings under s. 277, that a prosecution by him is in the public interest (para 151).

Generally, the Director of Public Prosecutions himself, like the Lord Advocate, should institute a prosecution in any case in which he considers it should be instituted (para. 161).

The cost of prosecutions undertaken by him should be a national charge (para. 162).

In prosecutions for more serious company frauds, the High Court should have power to direct trial by a High Court Judge and a City of London Special Jury (para. 163).

The powers to inspect books of companies registered under the Act should be strengthened (para 164).

The maximum penalty for conspiracy should be increased (para. 165).

Power should be given to enable a company to be indicted in Scotland, with power of search (para. 166).[45]

The Board of Trade should take energetic steps to enforce the filing of annual returns and accounts required by the Act (para 167).

Summary proceedings should be capable of being instituted within one year of discovery, instead of six months, by the Registrar of Companies, or, if the company is in liquidation, by the liquidator, provided not more that three years have elapsed since the offence was committed (para. 168).

31. Receivers (ss. 86 and 306 to 311).—No undischarged bankrupt should be appointed a receiver (para. 69).

A receiver should notify his appointment to the company or liquidator, and should send to the company or its liquidator, the Registrar of Companies, and

[44] The present limitations are: clerks and servants £50 during four months; workmen and labourers £25 during two months.

[45] cf. Defence Regulations 88A and 93A. In England it has been held that a company is capable of having *mens rea* (i.e.. intent to deceive) and can be indicted (*Director of Public Prosecutions* v. *Kent and Sussex Contractors Ltd.* [1944], 1 K.B. 146) (false information ued to get petrol coupons), followed by *R.* v. *I.C.R. Haulage Ltd. and Others* [1944], 1 K.B. 551 (common law conspiracy to defraud).

debenture-holders the following documents (para. 66):—

Statement of affairs at date of his appointment.

Yearly summary of receipts and payment.

Statement of affairs at conclusion of receivership.

A receiver should have power to apply to the Court to determine any relevant question (para. 67).

A receiver should be personally liable on any contract entered into by him, without prejudice to his right to indemnity out of assets (para. 68).

Statutory standardized powers for receivers would not be appropriate (para. 70).

32. Shareholders' Control.—Since the early days of joint stock companies when the investors were usually people of wealth with knowledge and experience of financial matters, the great redistribution of wealth has resulted in a large number of small investors who seldom take a close interest in the companies in which they hold shares. While executive power must inevitably be vested in the directors and is generally used to the shareholders' advantage, it is desirable, in order to prevent an abuse of power in exceptional cases, to devise provisions that will enable shareholders to concern themselves with proposals required by law to be put before them by the directors (para. 124).

The recommendations made by the Committee with this end in view are shown above in the paragraphs dealing with the following matters:—

Directors and Secretaries (No. 26). Meetings (No. 16). Polls (No. 18). Proxies (No. 17). Variation of Shareholders' Rights (No. 9).

The Committee found no occasion to make any recommendation with a view to preventing companies from taking unfair advantage of the possibilities of voluntary winding-up in order to repay shares or securities at less than the market price, on the grounds that the evidence showed that there had been very few such cases and that it would be undesirable to introduce, in order to prevent rare abuses, statutory provisions which would lead to entirely unpredictable results in the majority of honest and well-conducted companies. Class meetings of shareholders and the procedure under s. 153 are considered by the Committee to be adequate safeguards (para. 137).

Other matters (relating to shareholders' control and referred to in the evidence) on which the Committee refrained from making any specific recommendation are:—

(*a*) The introduction of a public shareholder under the Crown, who should hold at least one share in every public company in order to secure a status. He would in some measure oversee the company's affairs and take action when he thought necessary.

(*b*) A standing committee of shareholders of every public company, appointed by the Board of Trade in order to supervise the conduct of the company's business.

(*c*) The Dutch system of "commissarissen" whose special province is to supervise the management as representatives of the shareholders.[46]

[46] It is not compulsory in Holland to appoint "commissarissen" or a "commissaris." The powers of such officials can be framed in a wide variety of ways under the articles of association. The "commissarissen" may even conduct the management of a company in the absence of managers. They would probably come within the definition of directors in the Act, and like a board of directors would then be responsible as a body to the shareholders for supervising the management of the company. The position of a "commissaris" under Dutch law may well be comparable with that of a part-time director in England, and Dutch "directeuren" seem to resemble general managers in Great Britain. It seems that no change in the present company law of Great Britain would be needed to enable a company to be incorporated with articles of association providing for the conduct and supervision of the company's business by officials whose respective positions closely followed those of "commissarissen" and "directeuren" under Dutch law. The problem of correct representation of shareholders' interests seems to be not so much one of organization as one of getting the right people on the right terms, and ensuring that "part-timers" do not make use of confidential company information to the company's detriment.

33. Monopolies are regarded as being outside the Committee's reference (para. 1).[47]

34. Pension Funds.—It is considered sound in principle that companies should be required to invest pension funds outside the business, but there seem to be complications, and the matter is regarded as being outside the Committee's remit (para. 178).

35. Standard Advisory Committee.—A statutory committee is not recommended, but it is considered that an advisory committee to the Board of Trade would probably be useful (para. 175).

36. Legislation.—If an *Amending Act* be passed, it should be followed immediately by a *Consolidating Act* (para. 10).

37. Companies Not Registered Under the Companies Act.—Consideration might be given to the application of many of the provisions of the Act and of the Committee's report (particularly as regards prospectuses, accounts, and consolidated accounts) to chartered companies, statutory companies, and companies incorporated under deed of settlement (para. 177).

THE REQUISITIONING OF MERCHANT SHIPS[1]

[*Contributed by* SIR ARNOLD D. MCNAIR, K.C.]

THE object of this paper is to examine certain questions which arise in the domain of Conflict of Laws as to the status of merchant ships and, in particular, as to their *situs*. The presence of so many distinguished foreign lawyers at this Conference affords a valuable opportunity of discussing this topic from a comparative point of view—a point of view which is nowhere more desirable than in questions of Conflict of Laws.

I am not concerned with the inter-State questions to which merchant ships give rise, such as the criminal jurisdiction of States over foreign merchant ships in their ports or territorial waters,[2] for they belong to the domain of Public International Law. Nor am I concerned with such matters as births, marriages or torts occurring, or contracts made, on board merchant ships, though these matters, while mainly governed by the law of the flag State, not infrequently give rise to, or form an element in, questions of Conflict of Laws. I wish to consider primarily the question what, in the case of a merchant ship, is the respective importance of the law of the flag and of the *lex situs*, with particular reference to the power or right of requisitioning ships—a practice which has developed rapidly during recent years and is likely to continue for some time—and what *situs* must be assigned to a merchant ship.

The question of *situs* may become relevant for the following purposes:

(i) to determine the validity of (*a*) a voluntary, or (*b*) an involuntary, transfer of the ownership or possession of the ship;

(ii) as to (*a*), to determine the validity of a sale or mortgage or testamentary disposition;

(iii) as to (*b*), to determine the validity and effect of a judgment *in rem*, or some non-judicial act by a Government, affecting a ship.

[47] But in New York the prohibition of combinations forms part of the Stock Corporation Law; New York, s. 23, is as follows:— "No domestic stock corporation and no foreign corporation doing business in this state shall combine with any other corporation or person for the creation of a monopoly or for the unlawful restraint of trade or for the prevention of competition in any necessary of life."

[1] Being a paper read at the Annual Conference of the Grotius Society in London on June 2, 1945. It will appear in the *Transactions* of that Society in due course, and grateful acknowledgment is now made of the Society's permission to publish it in this *Journal*.

[2] See a valuable article by Charteris in *British Year Book of International Law*, vol. i, pp. 45-96.

The English rules relating to the transfer of tangible movables cannot be regarded as completely settled. Dicey[3] states them to be as follows:—

"Rule 152. A transfer of a movable which can be touched (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the transfer (*lex situs*), wherever such transfer is made, is valid."

(Rule 153 relates to intangible movables, e.g. a debt.)

"Rule 154. (1) Subject to the Exception hereinafter mentioned, and to the very wide effect of Rules 152 and 153, the transfer or assignment of a movable, wherever situate, in accordance with the law of the owner's domicil (*lex domicilii*), or of the place where such transfer or assignment is made (*lex actus*), may be presumed to be valid."

(2) (relates to intangible movables.)

"*Exception.*—When the law of the country where a movable is situate (*lex situs*) (1) prescribes a special form of, or (2) imposes conditions of validity of, transfer or assignment, a transfer or an assignment according to the law of the owner's domicil (*lex domicilii*), or of the place where the transfer or assignment is made (*lex actus*), is, if the special form be not followed or the conditions be not fulfilled, invalid as a transfer or assignment, but it may be valid as a contract to transfer or assign."

Rule 151, which I shall not quote, relates to personal capacity.

Westlake[4] likewise attributes the predominant influence to the *lex situs*. Cheshire[5] would place serious limitations upon the relevance of the *lex situs*. I shall not pursue the general controversy, because my primary object is to endeavour to ascertain what are the rules governing one particular class of movables, namely, merchant ships, and one particular kind of act affecting them, namely, requisition, and what are the parts played by the *lex situs* and the law of the flag respectively.

I shall not discuss voluntary transfers.

An involuntary transfer may come about in a variety of ways:—

(i) by means of a judgment *in rem* of a Court within whose jurisdiction the ship is at the relevant time;

(ii) by means of some non-judicial act of the Government within whose jurisdiction the ship is at the relevant time;

(iii) which must be put in the form of a question—to what extent can the flag State validly effect the requisition[6] of one of its merchant ships (*a*) when

[3] *Conflict of Laws*, 5th ed. (Berriedale Keith), cited as "Dicey."

[4] *Private International Law* (7th ed.) (Bentwich), ch. vii; cited as "Westlake."

[5] *Private International Law* (2nd ed.), pp. 423-439.

[6] *The nature of the rights acquired by a State in ships requisitioned by it.* It is believed that the argument and the conclusions submitted in this paper are independent of the precise nature of the rights which a valid requisition vests in a State (or, as we must sometimes say, as in the case of the Spanish Civil War, in a Government). Their nature must be governed by the terms of the decree under which the requisition is effected, but the term "requisition" usually denotes a temporary possession or control rather than a confiscation of property and a vesting of it in the State. In *The Broadmayne* [1916] P. 64, it was recognized by the C.A. that the ship requisitioned remained the property of the owners. Pickford L.J. said at p. 73: "There is no particular magic in the word (requisition) itself; it does not connote the same state of things in every particular case." And in *The Sarpen, ibid.*, p. 306, the C.A. held that the requisition of that ship did not make her a ship "belonging to His Majesty" within the meaning of s. 557 of the Merchant Shipping Act, 1894, and as such debarred from making a claim for salvage services; and see Pickford L.J. at p. 317. In *The Cristina* [1938] A.C. 485, 502, Lord Wright said that "The word 'requisition,' while not a term of art, is familiar and has been constantly used to describe the compulsory taking by Government, invariably or at least generally, for public purposes of the user, direction and control of the ship with or without possession." See also the following: *Nicolaou* v. *Ministry of War Transport*, 77 Ll. L. Rep. 495; *Annual Digest and Reports of Public International Law Cases* (cited as *Annual Digest*), 1923-1924, Case No. 226, and also the discussion of the meaning of requisition in *The Laurent Meeus, Annual Digest*, 1941-1942, Case No. 35.

on the high seas or (*b*) when within the territorial or the national waters of a foreign State?

(i) *The judgment* in rem[7] *of a Court within whose jurisdiction the ship is, or which for other reasons is a Court of competent jurisdiction.*

A judgment *in rem* of any Court within whose jurisdiction a ship is or which for other reasons is a Court of competent jurisdiction, is regarded by the law of England and by the law of many, if not most, other countries, as valid throughout the world. For this proposition we may cite statements contained in the judgments in *The Segredo*[8] and in *Simpson* v. *Fogo*,[9] and, more directly, in *Castrique* v. *Imrie*[10] in the House of Lords, and the passage from Story cited by Dicey[11] and approved by the House of Lords in that case.

Such a judgment may take the form of

(*a*) a condemnation by a court of prize:

In *The Odessa*[12] Lord Mersey, in delivering the Opinion of the Privy Council, said: "The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure and to transfer it as from that date to the Sovereign or to his grantees. . . . As the right to seize is universally recognized, so also is the title which the judgment of the Prize Court creates. The judgment is of international force."

(*b*) a judgment upon a claim to establish ownership:

(*c*) a judgment vesting possession of the ship in an administrator appointed by the Court:[13]

(*d*) a decree that a ship shall be sold in satisfaction of some lien or privilege or other right recognized by the Court possessing jurisdiction as inhering in the ship itself; for instance, a liability for the cost of repairs:[14]

(*e*) a decree that the ship shall be sold to satisfy an award of damages for collision or of salvage:[15]

(*f*) a decree of forfeiture for a breach of the revenue laws or other legislation binding the local Court:[16]

(*g*) an adjudication in bankruptcy or other insolvency proceedings.[17]

The principle "that a judgment *in rem* is binding everywhere" was stated by Blackburn J. in *Castrique* v. *Imrie*[18] to be "in truth but a branch of that more general principle" that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere."

(ii) *Some non-judicial act of the Government of the State in whose jurisdiction the ship is at the relevant time.*

(*a*) *Angary.* The nature and limits of the right of angary are the subject of controversy,[19] but there is no doubt that in time of war or other acute national

[7] Which Dicey (p. 272) defines as "a judgment whereby a Court adjudicates upon the title to, or the right to the possession of, property within the control of the Court."

[8] (1853) 1 Spinks Eccl. and Adm. 36, at p. 57.

[9] (1863) 1 H. & M. 195.

[10] (1860) 8 C.B. (N.S.) 1; *ibid.* 405; (1870) L.R. 4 H.L. 414.

[11] At pp. 418 and 484.

[12] [1916] 1 A.C. 145, 153; *Hughes* v. *Cornelius* (1680) 2 Show. K.B. 232; and see Hyde, *International Law*, ii, s. 903.

[13] *The Jupiter* [1927] P. 122, 133.

[14] *Castrique* v. *Imrie, supra*; and see *Minna Craig Steamship Co.* v. *Chartered Bank of India* [1897] 1 Q.B. 55 and 460.

[15] *The City of Mecca* (1881) 6 P.D. 106 (though in that case the foreign action was a personal one).

[16] *Beak* v. *Thyrwhit* (1688) 3 Mod. 194; *Lumly* v. *Quarry* (1702) 7 Mod. 9.

[17] *The Segredo* (1853) 1 Spinks Ecc. and Ad. 36, 58.

[18] (1870) L.R. H.L. 414, 429.

[19] See Oppenheim, *International Law*, vol. ii (6th ed.). ss. 364-367; Bullock in *British Year Book of International Law*, 1922-1923, pp. 99-129; Report of Admiralty Transport Arbitration Board, p. 17—the case of the Finnish ships (published by H.M. Stationery Office, 1927); *The Zamora* [1916] 2 A.C. 77.

emergency a State has power to requisition and use foreign merchant ships (and other means of transport) lying within its jurisdiction and belonging to the nationals of other States (or, in time of war, the nationals of neutral States), when urgently required for purposes of transport.[20] Oppenheim suggests that the right extends to the high seas, but this statement is highly controversial. The exercise of the right of angary is subject to the payment of compensation. Normally, it is believed, its exercise transfers possession but not ownership.[21] It is now the common practice for the British Prize Court to sanction the requisition by the Crown of enemy or neutral merchant ships in the custody of the marshal awaiting adjudication. Such a requisition transfers possession but not ownership. It is not a case of angary.

(*b*) *Other Seizure by a Foreign Government.* The right of angary exists only in time of war or other acute national emergency. If, however, a Government took possession of a foreign merchant ship lying within its waters and used it, it would be necessary, whatever the diplomatic remedy might be, for the Courts of the flag State or of any other State to respect that possession when avowed by the Government in possession and to defeat any attempt by the owner to recover possession by judicial means.[22]

Requisition.

To what extent, if at all, can a State requisition merchant ships carrying its flag when they are outside its national or territorial waters? That is to say, in the requisitioning of merchant ships by the flag State, what, if any, is the relevance of their *situs*?

We shall (*a*) begin by attempting to examine the extent and nature of the power of requisition, as recognized by English constitutional law, and the peculiar legal position of a British ship, and (*b*) shall then examine such decisions as may help us to answer the questions posed above.

(a) *Extent and Nature of the Power to Requisition.*

The late Sir William Holdsworth in an article in the *Law Quarterly Review* of January, 1919, entitled "The Power of the Crown to Requisition British Ships in a National Emergency," discussed in great detail both the spatial scope and the legal basis of this power. After an examination of a large number of writs, orders and commissions issuing with royal authority from the thirteenth century onwards and certain relevant statutes and decisions, he demonstrated a long course of practice whereby the Crown requisitioned for purposes of national emergency British merchant ships in British territorial waters, on the high seas and even in foreign ports.[23] In its origin the power owed something to feudal conceptions, namely, the duty of British ports to provide the King with ships in return for their franchises, but later the power came to be based rather on allegiance. He pointed out that this allegiance was not merely the shipowners' allegiance but the allegiance of the ships themselves, and stressed the significance

[20] See (British) Defence Regulation 53, quoted below.

[21] The nature of the right acquired by a belligerent State which requisitions neutral shipping is discussed in *Annual Digest*, 1923-1924, Case No. 226, where it was described by an American-German Claims Commission as a "special or qualified property in the ships tantamount to absolute ownership thereof for the time being . . . an estate defeasible upon the happening of some event completely within his control": *American Journal of International Law*, XVIII (1924), p. 628.

[22] *The Cristina* [1938] A.C. 485.

[23] See the present (British) Defence Regulation 53, which empowers the Crown to "requisition

(*a*) any chattel in the United Kingdom (including any vessel or aircraft and anything on board a vessel or aircraft), and

(*b*) any British ship or aircraft or anything on board a British ship or aircraft, wherever the ship or aircraft may be."

(A proviso excludes Dominion ships and aircraft.)

of the expression "Ships of the King's Ligeance" occurring in 5 Rich. II, c. 3, and 6 Rich. II, c. 8, as lying "at the root of a good many of the later rules of law as to shipping." The fact that in earlier times the Crown requisitioned both ships and the services of the masters and mariners points in the same direction. "The width of these powers is accounted for by the fact that they were to a large extent based not on the locality of the ship, but upon the theory that shipowners and their ships owed allegiance to the Crown." The judgment of the Admiralty Transport Arbitration Board, referred to above, refers to "the view that requisition is based on allegiance."

Our law distinguishes between the temporary and local allegiance owed to the Crown by the alien in this country and the permanent and personal allegiance owed by British subjects wherever they may be. Moreover, the Crown by prerogative may at any time order its subjects, and British merchant ships, to return to this country. It would not be surprising if allegiance formed an element in the right of the Crown to requisition its subjects' property of any kind; at any rate from earliest times the Crown has had a peculiar interest in merchant ships carrying the British flag. For a long time they formed the only fleet on which the Crown could rely, and when at last a royal navy was established it was constantly and necessarily supplemented by merchant shipping either requisitioned or voluntarily placed at the disposal of the Crown. Section 1 of the Merchant Shipping Act, 1894, emphasizes the importance of ensuring that every owner of the whole or a part of a British ship shall beyond a doubt owe allegiance to the Crown.[24]

The expression "Ships of the King's Ligeance" may be an archaic personification of the ship, but it embodies an early recognition of the peculiarly national character of merchant ships.

Private International Law draws the sharpest possible distinction between "movables" and "immovables," and in a physical sense a ship is one of the most "movable" things imaginable. But in a legal sense it is tied to a particular territory and, as I shall submit, to the law governing that territory, in a peculiar fashion. The Merchant Shipping Act, 1894, s. 13, enacts that "The port at which a British ship is registered for the time being shall be deemed the port of registry and the port to which she belongs," a provision which establishes the criterion of the right to fly the British flag and also constitutes a proof of title.[25] Transfers on sale, mortgage or otherwise and transmissions on death, marriage or bankruptcy must be recorded on the ship's register, and certain statutory documents must be employed.

The same suggestion of a peculiar element in the relation of a ship to the State to which it "belongs," a vital interest of the State in its merchant ships, occurs in Beale's[26] discussion of the law of the flag. After stating (s. 45.1) that the law prevailing on American vessels is "the law of their port of registry, which is the port nearest to the domicils of the majority of the owners," he points out the error of the old view that a merchant ship is a part of the territory of the State of registry and adds "The correct explanation is that the law of the State of registry extends over the vessel because of the jurisdiction of the State over it as a portion of the property belonging in the State," and he cites a statement by Van Devanter J.[27] in the United States Supreme

[24] See s. 18 of the repealed Merchant Shipping Act, 1854.

[25] See also Section 265 of the same Act (Conflict of Laws), which enacts that:

"Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then if there is in this Part of the Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision the case shall be governed by the law of the port at which the ship is registered."

[26] *Conflict of Laws*, a high if not the highest American authority.

[27] In *Cunard S.S. Co.* v. *Mellon* (1923) 262 U.S. 100, 123; *Annual Digest*, 1923-1924, Case No. 57.

Court to the effect that this jurisdiction " partakes more of the characteristics of personal than of territorial sovereignty."

It is relevant to quote here two statements from text-books:—Dicey:[28] " A State's authority, in the eyes of other States and the Courts that represent them, is, speaking very generally, coincident with, and limited by, its power. It is territorial. It may legislate for, and give judgments affecting, things and persons within its territory. It has no authority to legislate for, or adjudicate upon, things or persons (*unless they are its subjects*)[29] not within its territory." Beale:[30] " While a State can exercise no legislative jurisdiction in the strict sense outside its own boundaries, it nevertheless has power to command its own citizens wherever they may be. As regards them it may issue commands for the regulation of their conduct while they are abroad. The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."[31]

(b) *Decisions, British and Foreign.*

Let us now look at some decisions, British and foreign, and see whether they throw any light on the relevance of the *situs* of a merchant ship as a condition of its susceptibility to requisition.

Holdsworth, in the article referred to above, quotes numerous writs and orders for the requisition of British merchant ships wherever they might be—at home or abroad. The practice was so common that it would be surprising to find it challenged. In *The Case of Ship-money* in 1637, examined at some length by Holdsworth, the legality of the power of requisition did not come directly into question and was acknowledged by both sides. The question of *situs* did not arise. In an Opinion given by two Admiralty judges in 1650 (printed by Holdsworth in the article referred to above), the right of the Crown to requisition certain British ships outside British waters and probably on the high seas was assumed without discussion.

Furness, Withy & Co. v. *Rederiaktiebolaget Banco*[32] arose not upon a requisition but upon a law passed by the flag State. In 1916 a Swedish emergency decree made it illegal for Swedish ships of the kind in question to carry goods between two places outside the limits of that country. The Swedish shipowners invoked this decree (whether it was made before or after the date of the charter is not clear) as amounting to " a restraint of princes," and so a ground for refusing to allow the ship to be used by the charterers outside Swedish limits. Upon it being objected that the decree could not operate as a " restraint of princes " while the ship was outside Swedish jurisdiction, Bailhache J. held that " where the law of a foreign State prohibits the performance of a contract, such as a charterparty, and renders the owners or master of the ship liable to fine or imprisonment if he disobeys that law, you have a case of restraint of princes provided the owner or master are (*sic*) subject to the jurisdiction of the foreign State either by being physically within its territory or by being subjects of that State."

In *Russian Bank for Foreign Trade* v. *Excess Insurance Co.*,[33] where the Crown, armed with a Proclamation empowering it " to requisition and take up for Our service any British ship or British vessel within the British Isles or the waters adjacent thereto," purported to requisition a British ship lying in a Russian port, Bailhache J. held the requisition to be *ultra vires* and void. It

[28] At p. 20.
[29] Italics mine. These are the words stressed by Atkinson J. in *Lorentzen* v. *Lydden & Co.* [1922] 2 K.B. 202.
[30] *Conflict of Laws*, s. 63. 1.
[31] Story J. in *The Apollon* (1924) 9 Wheat. 362, 370.
[32] [1917] 2 K.B. 873.
[33] [1918] 2 K.B. 123; [1919] 1 K.B. 39.

was clearly not within the terms of the Proclamation, but the Crown was not represented and the question whether such a requisition fell within the Royal prerogative does not appear to have been seriously argued. The decision was upheld on another ground, but in Holdsworth's opinion the judgment of Bailhache J. on the question of requisition was wrong.[34]

In *The Jupiter* (No. 3)[35] one of the questions discussed was whether a Russian merchant ship had become the property of the U.S.S.R. by virtue of a decree of nationalization. Hill J. referring to " the question whether the decrees transferred the property wherever situated," remarked that " it was not suggested that ships were to be governed by any principles other than those applicable to other chattels." (This is, it is submitted, highly controversial.) He continued: " If the *Jupiter* was not within the territory of the R.S.F.S.R., I do not see how the mere passing of a decree could transfer the property. This seems to me to be recognized in all the cases. . . ." But as the learned judge held that the nationalization decrees did not purport to have extraterritorial operation and that the *Jupiter* was not within Soviet jurisdiction at the relevant time, the passage cited above was doubly *obiter*. The decision is useful for another reason, for Hill J., with the approval of the Court of Appeal, held that the decrees of French Courts vesting possession of the *Jupiter* in a French administrator and *made while she was lying in a French port* must be recognized by English Courts.

A Norwegian requisitioning decree of May 18, 1940, made after the German invasion of Norway but from Trondjhem in Norway where the Norwegian Government still was, came before the King's Bench Division in *Lorentzen* v. *Lydden & Co.*[36] in 1941. Article 1 of the Decree is quoted later[37] in connection with *The Rigmor*. By Article 4, subsection 3, of the same Decree the Norwegian Minister of Shipping as " curator " was " entitled to collect claims belonging to owners as mentioned in arts. 1 and 2, to enforce by action any claims that [they] may already have, or which they may later acquire, to effect compromises or accept settlements and give valid discharges." The Norwegian curator sued to recover damages for breach of a charterparty in relation to a ship which had been sunk in April, 1940, and had belonged to a Norwegian company which fell within the scope of the Decree. The claim was resisted on the ground, amongst others, that it could not have extraterritorial effect, but Atkinson J. rejected this plea and upheld the curator's claim. " To suggest," he said, " that the English courts have no power to give effect to a decree making over to the Norwegian Government ships under construction in this country seems to me to be almost shocking." The judgment is an important one on the extraterritorial effect of foreign decrees, but the case of the requisitioning of ships was not directly in question.

The Cristina[38] again is disappointing. The question whether a requisitioning decree of the (Republican) Spanish Government could operate upon a Spanish ship which had not been in Spanish waters since the date of the decree and was lying in the port of Cardiff when actually requisitioned was argued,[39] but it was unnecessary to decide it, because the Spanish Government had in fact acquired possession of the ship and that possession must be recognized and

[34] 35 L.Q.R. at p. 42.

[35] [1927] P. 122, 144. The Court of Appeal (*ibid.* 250) did not dissent and had no occasion to do so.

[36] [1922] 2 K.B. 202.

[37] At p. 76.

[38] [1938] A.C. 485, and in particular Lord Wright's speech. And see the analysis of this case in *British Year Book of International Law*, 1938, pp. 243-247. See also *The Kabalo* [1940] 67 Lloyd's List Law Reports, p. 272; *Annual Digest*, 1938-1940, Case No. 92 (a Belgian requisition of a Belgian ship when lying in a foreign port).

[39] [1938] A.C. at p. 488.

protected by an English Court. Lord Wright said:[40] " It must also be noted in the present case that the *Cristina*, even when in Cardiff docks, may have, as being a foreign merchant ship, a different status from an ordinary chattel on land. But as the relevant fact here is that the Spanish Government had in fact requisitioned her, there is no need to consider whether in any sense, or to what extent, she was subject while in English territorial waters to the law of her flag, or to the operation of the Spanish decree." She was registered in the port of Bilbao which at the date of the requisitioning decree was within the control of the (Franco) Nationalist Government.

Several other cases involving a requisition during the Spanish Civil War were similarly decided on the ground of Governmental immunity based on actual possession, and shed no light upon the scope of operation of a requisitioning decree.[41] On the other hand, in *The El Condado*,[42] by reason, I think, of the Scottish procedure connected with the grant of an interim injunction, it became possible and necessary to discuss the scope of the requisitioning decree, because the defendant was not a Spanish Government but a Scottish bank which had become a surety upon the grant of the injunction. Both Divisions of the Court of Session rejected the contention that the Spanish requisitioning decree operated upon Spanish ships lying in Scottish waters.[43]

In *The Navemar*[44] a series of American Courts had to deal with the effect of a Spanish requisitioning decree upon a Spanish ship which at the date of the decree was lying in an Argentine port. The operation of the decree was finally upheld, but it was pointed out that it was not necessary to the decision to say that the decree operated upon her while in Argentine waters, because even if it did not operate while she was there it " would become operative upon the vessel as soon as she reached the high seas." A large number of American decisions upon these Spanish requisitioning decrees have recently been examined by Professor Preuss[45] in the *American Journal of International Law*, and there appears to be a tendency for the American Courts to regard merchant ships, for the purpose of requisitioning, as " quasi-territorial," so that the requisitioning of a ship outside the territorial waters of the requisitioning State " is not an extraterritorial exercise of State authority." In one case it was said that that jurisdiction over ships " partakes more of the characteristics of personal than of territorial sovereignty."

In *Ervin* v. *Quintanilla*[46] a United States Circuit Court of Appeal gave effect to a plea of State immunity in a case where the foreign Government " peaceably, but fully and completely, and in every way possible, took possession of the

[40] [1938] A.C. at p. 509.

[41] *The Arraiz*, 61 Lloyd's List Law Reports (1938), p. 140; *The El Neptuno*, 62 *ibid.* (1938), p. 7; *The Arantzazu Mendi* [1939] A.C. 256 (all reported in *Annual Digest*, 1938-1940). See the analysis of the decisions of Bucknill J. and the C.A. in *The Arantzazu Mendi* in *British Year Book of International Law*, 1939, pp. 151-154.

[42] (In the Sheriff Court) 59 Lloyd's List Law Reports (1937), p. 119; *Annual Digest*, 1938-1940, Case No. 90; in the Court of Session 63 Lloyd's List Law Reports (1939), pp. 83 and 330; [1939] Session Cases, 413; *Annual Digest*, 1938-1940, Case No. 77.

[43] The following foreign decisions upon the requisitioning of ships may be mentioned, though they do not throw light upon the point under discussion: *Agusquiza and the Spanish Government* v. *Société Sota y Aznar*, *Annual Digest*, 1935-1937, Case No. 70; *Larrasquitu and the Spanish State* v. *Société Cementos Rezola*, *ibid.*, No. 71; *The s.s. Baurdo*, *ibid.*, No. 73; *The Sandeja*, *ibid.*, No. 80; *Urrutia and another* v. *Martiarena*, *ibid.*, No. 94; *The Rita Garcia* (1937), 59 Lloyd's List Law Reports, 140; *Lafuente* v. *Laguno y Duranona*, *Annual Digest*, 1938-1940, Case No. 55; *Saez Mura* v. *Pinillos and Garcia*, *ibid.*, No. 95.

[44] 59 Lloyd's List Law Reports, 17; 62 *ibid.*, 76; 64 *ibid.*, 220; *Annual Digest*, 1938-1940, Case No. 68; discussed in McNair, *Legal Effects of War* (2nd ed.) (1944), pp. 378, 379.

[45] Vol. 36 (1942), pp. 37-55. For the continental European decisions arising out of the Spanish Civil War, he refers to Jaenicke in 9 *Zeitschrift für ausländischer öffentliches Recht und Völkerrecht*, (1939), pp. 354-382.

[46] (1938) 99 F. (2d.) 935; 306 U.S. 635 (1939); cited by Preuss, *op cit.*, at p. 32.

vessel for the Republic of Mexico," the vessel being in an American port when she was requisitioned.

In *The Laurent Meeus*[47] three United States Courts, including the Supreme Court, had to consider the effects of the requisition by the Belgian Government of a Belgian vessel while lying in an American port upon a charter. The validity of the requisition was not directly in question and it appears to have been assumed that the Belgian Government acted within its powers through the instrumentality of the local Belgian consul.

Professor Preuss, after suggesting that " where a government has jurisdiction, whether personal or territorial, over the owner or those who have custody of a vessel, the vessel itself is within the jurisdiction of that government for purposes of subjecting it to a decree of requisition," concludes a review of the American cases by submitting on this point that[48]

" For purposes of requisitioning, a national vessel is considered as quasi-territorial." Therefore, the requisitioning of a ship while it is on the high seas (or, *semble*, while it is within the territorial waters of another State) is not an extraterritorial exercise of State authority."

The Norwegian requisitioning Decree of May 18, 1940, already referred to, received judicial consideration in Sweden in 1942. Article 1 of the Decree purported to requisition

" All ships registered in Norway or belonging to a port there and situate outside the area in Norway which is occupied by an enemy power and which are owned by (*a*) persons domiciled in the occupied area or carrying on business from an office there, (*b*) part ownerships, corporations, joint stock companies or other companies registered in or having their board of directors in such area or carrying on business from an office there . . ."

In *The Rigmor*[49] the Supreme Court of Sweden had no difficulty in holding that this Decree operated upon the *Rigmor* which was in Swedish waters at the date of the decree. The Court pointed out that " the carrying into effect [of a State process of requisitioning] can occur even without the collaboration of the owner of the requisitioned object, and this will particularly be the case if the owner [as happened in this case] is in territory occupied by an enemy State. It is true that the carrying into effect within the territory of another State cannot take place under compulsion and be legally binding. But if, as in the present case, it takes place with the consent of the immediate possessor *and especially if the latter is a subject of the requisitioning State and holds the position of captain of the vessel affected by the requisitioning,*[50] it can only be regarded as not legally binding on the assumption that the decree on which the execution is based is such that because of its departure from the fundamental principles of the law of our country it ought not to be taken into account. This cannot be said to be the case with the Norwegian requisitioning decree."[51]

One way of approach in dealing with a requisition by a foreign Government is to treat it as a governmental act which the Courts of another country cannot investigate. In *The Adriatic*,[52] where the British Admiralty requisitioned a British

[47] 43 F. Supp. 807; 133 F. (2d.) 552; certiorari denied, 318 U.S. 781; *Annual Digest*, 1941-1942, Case No. 35. I have not seen the original reports.

[48] *Op. cit.* at p. 55. See also Beale, *Conflict of Laws*, s. 63.1, with no special reference to ships or requisitioning, " a state . . . has power to command its own citizens wherever they may be." The question of enforcing those commands is quite a different matter.

[49] *American Journal of International Law*, vol. 37 (1943), pp. 141-151; *Annual Digest*, 1941-1942, Case No. 63.

[50] The words which I have italicized are reminiscent of the notion of allegiance which, as has already been noted, is an important element in the British power of requisitioning ships.

[51] The Court also held that the vessel, being in the possession of the British Government by virtue of a demise charter, was immune from arrest by reason of the plea of State immunity.

[52] (1918) 253 Fed. 489; (1919) 258 Fed. 902; *Annual Digest*, 1919-1922, Case No. 9.

ship on the high seas, proceedings took place in two Federal Courts of the United States of America (a District Court and a Circuit Court of Appeals), in which the requisition was challenged by the charterers on the ground that the ship was not in British waters at the time of the requisition. The District Court declined " to adjudicate any claim of right advanced by the libelant which grows out of the requisitioning of the respondent vessel by the government to which its master and owners owe the duty of obedience," and the Circuit Court of Appeals likewise treated the question as " not justiciable."

Some Text-writers.

Note 29, part II, in the Appendix to Dicey, contains the following passage:[53]

" It is, in fact, impossible to accept the view of a ship as being in the same position as an ordinary movable, so that its *lex situs* is the law of any place where it may be for the time being. Admittedly, some law must apply to it when on the high seas, and this law clearly ought to be the law of the ship's flag, on the assumption that that law recognizes the ship as entitled to the colours which it bears. It is, therefore, sound in principle to ascribe to a ship a *situs* in the country to which she belongs as is in effect done by the legislation which applied probate duty in respect of ships registered in the United Kingdom, although at sea or elsewhere at the time of the death of the testator or intestate."

The word " belongs " is doubtless used in the same sense in which s. 13 of the Merchant Shipping Act, 1894, provides that the port of registration of a British ship is " the port to which she belongs."

Westlake[54] fails to state a clear principle and certainly cannot be claimed as a supporter of the view stated in Dicey's Appendix quoted above.

Beale[55] has a section entitled *Jurisdiction over Things outside the State,* in which he says that: " A State has jurisdiction over a chattel outside its boundaries only in certain cases," of which one is " If the chattel is habitually kept within the State, but is temporarily outside it," and in s. 50.5 he mentions the case of a motor-car having its headquarters in a garage in one State and temporarily travelling outside it. But I do not think that the statement applies to a ship.

Martin Wolff[56] attributes to all means of transport, railway rolling-stock, motor-cars, aircraft, " some fixed resting place, in which they are as it were resident, even if temporarily absent. In the case of sea-going ships, the law of the flag replaces the *lex situs* . . . Thus a ship while on the high seas or in a foreign port can be alienated or mortgaged according to the law of the flag or the port of registration . . ."

Conclusion.

In conclusion, the following propositions upon the right to requisition British merchant ships while they are outside British national or territorial waters are submitted:—

(1) that the matter is not yet settled by English decisions and that it is therefore both right and necessary to have regard to historical practice, to considerations of public policy and to the decisions of foreign Courts:

(2) that it has been the undoubted English practice for many centuries to requisition English ships outside English waters, both on the high seas and in foreign waters:

(3) that the inherent characteristics of merchant ships, as a part of the war potential of the nation and by reason of their legal dependence on their port of registry, distinguish them from ordinary movable chattels:

[53] 5th ed., p. 996.
[54] 7th ed., pp. 197-206.
[55] *Conflict of Laws,* ss. 99.1 and 471.6.
[56] *Private International Law,* p. 530.

(4) that for the purposes of executive action in time of war or other national emergency the Crown has by virtue of the permanent and personal allegiance owed to it by British subjects a jurisdiction to issue orders to them as to the disposal, in the national interest, of their property, even though it be outside British territory and waters:

(5) that the importance of the law of the flag in the internal life of a British merchant ship and in the mercantile transactions with which she is concerned makes it not unreasonable that, for the purposes of executive action, she should be regarded as remaining within British territorial jurisdiction, wherever she may be physically:

(6) that the American decisions indicate a tendency towards giving extra-territorial effect to a requisitioning decree:

(7) that for the foregoing reasons the Crown has the right to requisition British merchant ships whether they are in British waters, on the high seas or in foreign waters, and to enforce that requisition upon them anywhere except in foreign waters.

Conversely, the British Government and Courts should recognize a corresponding right in other States.

INTERNATIONAL LEGISLATION

[*Contributed by* F. N. KEEN, ESQ.]

IT seems clear that large changes of opinion have been and are taking place here and in the United States and in various other countries in the direction of recognizing that it is essential to the continuance of civilization for international relations to be placed upon such a new basis as will enable law and order to be maintained effectively among the nations, and an end to be made of war. What will this new basis involve? If it is to command the support of the world in adequate strength must it not be democratic in character? Can it be that we are approaching the time when the world will be equipped with an international organization which will include a legislative body representative of the whole community of nations and having a real and effective power of legislation over a wide field of international conduct and relations covering all matters essential to peace and international justice? If so, comparative legislation will have a new sphere of usefulness, for its processes, though not perhaps so necessary in the international as the national arena, can be largely helpful in providing material for guidance of an international legislature.

The present writer has striven for thirty years to secure acceptance of the idea that the key to the problem of world peace lies mainly in the establishment of an international legislative body representing the various national states and allowing to each a voting power bearing some reasonable relation to its population and status: a body which will be able to reach decisions in a business-like way through use of a reasonable system of majority-voting, and to which the national states will by agreement concede the sovereign power of control over such matters of international relationship as it may be necessary from time to time to regulate internationally in the interests of peace.

Under the stimulus of the atomic bomb, some ideas of this kind seem actually to have penetrated now into the minds of the hierarchy of statesmen, for in *The Times* for September 8, 1945, there is a report of a speech by Mr. Philip Noel-Baker, M.P., the new Minister of State (speaking at a conference at the Foreign Office as chairman of a sub-committee, set up by the Executive Committee of the Preparatory Commission of the United Nations, to make recommendations concerning the General Assembly of that body) in which he is reported as saying that " he had always felt that to do any good an international assembly must work by parliamentary democratic methods "; that " the United

Nations must be organized for peace by the same methods as those used by Britain and the United States to preserve peace in their respective countries"; and that "a tremendous effort would be needed on the part of everybody concerned to ensure that the new institutions were understood and supported by the citizens of all countries." He might usefully have further illustrated his theme by a reference to Australia, where the principle of parliamentary democratic government is planted as firmly as in Britain, and where the sovereignty over specific matters of common concern is entrusted to the federal Parliament of the Australian Commonwealth, the residual power of control over matters not so delegated being at the same time retained by the legislatures of the individual States.

It is strange that it should have required the impetus of the atomic bomb to drive home the truth of an idea which seems obviously well-founded and vital, that in the democratic atmosphere of to-day there is little hope of getting the community of national states established upon a stable basis of peace unless the common will of the general body of states can be made dominant over their common concerns through machinery which will enable international laws on essential matters to be effectively made, applied and enforced, and final and authoritative decisions on matters of common concern to be arrived at without excessive difficulty and delay. Even recent writings by eminent professors on subjects of this kind, antecedent to the advent of the flying bomb, have shown little tendency to recognize the force of this fundamental idea, although in some other quarters there are signs of the stirring of a bolder and more ambitious spirit.

Professor Kelsen's recent book *Peace Through Law*[1] leads up to the conclusion that the only serious guarantee for the legal exercise of power by a world organization is the provision that the armed forces of the League—whether a true international police force or the armed forces of one or several member states—are to be employed not at the order of a political body but in execution of the decision of a court.

Professor Kelsen recognizes that nothing is more dangerous to peace than the existence of a conflict which is not settled, and for the peaceful settlement of which no obligatory procedure is provided, but he thinks that the Powers represented at the Moscow Conference had not in view the establishment of an international agency endowed with legislative or executive power. He thinks that we can hardly expect the system of general security to afford a more satisfactory competence than that which the Covenant of the League of Nations conferred upon the Council and the Assembly, although he admits that both of those bodies were hampered by the principle of sovereign equality, carefully maintained by the Covenant, the principle that no state can be bound without or against its will, so that both bodies were able to adopt decisions binding upon the members only by unanimous vote, and, as a rule, with the consent of the members whose interests were affected by the decision. He claims that the sole international organs whose procedure is actually not subjected to the rule that no state can be legally bound without or against its will are international tribunals. These agencies are competent to adopt decisions by a majority vote, and their decisions are binding upon the states which have established the tribunal by an international treaty, but are not "represented" in the tribunal, in the sense of representation by a person bound by the instructions of the state represented. He thinks it probable that a court which has the power to decide all disputes without any exception will, in cases in which the strict application of positive law seems to be unsatisfactory to the judges, adapt the positive law to their own idea of justice and equity.

By steps such as these Professor Kelsen makes his way to the final conclusion

[1] *Peace Through Law*. By Hans Kelsen. (University of North Carolina Press: Humphrey Milford) 1944, 12/- Pp. xii, 155.

above mentioned, but he seems not to realize how lame it must appear when taken in conjunction with the facts, firstly, that wars are mainly caused by the desire not to apply but to change or abrogate existing law and legal rights, and, secondly, that courts of law would be unsuitable bodies for decreeing such changes, and, if they went on the lines of applying existing law and legal rights, would provide no safety-valve for peaceful change and therefore no real security against war.

Professor Brierly in his *Outlook for International Law*[2] gives a very clear and able presentation of the nature and functions of international law as it stands to-day, and of the character of the problems and difficulties involved in the pursuit of means for the prevention of war. He makes illuminating comparisons between the circumstances and conditions of order in the national and international fields. He, unlike Professor Kelsen, recognizes that the most difficult disputes—those that endanger international peace—are never likely to be settled by courts, and emphasizes that disputes which endanger civil peace inside the state are not settled in that way either. He maintains that a dispute, which has arisen because one or other of the parties is dissatisfied with its rights and thinks that they ought to be changed in its favour, is only too likely, if decided on the basis of existing law, to leave the dispute to continue on the plane not of law but of interests. He says that a power of altering established rights would essentially be not a judicial power but a power to legislate, and whatever the future of international legislation may be it is certain at least that it will never be entrusted to a few irresponsible individuals, however eminent and fair minded. He recognizes that, when we are devising a method of peaceful change by due process of law, we cannot be content with one that would work only against a small and weak state; it must be one in which the decision will be given, and if necessary enforced, without either fear or favour. But he is impressed with the difficulty of going over from a system of " advising " and " recommending " to a system of " deciding " and " legislating " in regard to international political disputes, and so he comes to the lame and disappointing conclusion that the only kind of precedure of peaceful change that is likely to be practicable in any future with which we need concern ourselves is one in which third states may be able to influence, but not to decide, the manner in which a demand for a change in legal rights is to be dealt with. He thinks the two essentials are the constitution of some form of international standing conference, and an obligation on states to submit their disputes to such a body, not for decision but for consideration. His book would thus leave us without any reliable antidote to war.

The volume of *Transactions of the Grotius Society* for 1943 includes a paper on " The Future Development of International Law " by the present writer which definitely advocates the creation of a legislative body as part of the organization of the United Nations. The paper takes as a sort of text a declaration in paragraph 5 of the statement on " The Future of International Law " which was adopted by the Grotius Society on December 17, 1941, and appears on pages 289-291 of the *Transactions* of the Society for that year. That paragraph declares the need for the establishment of some system of international order and authority involving the acceptance of considerable limitations of national sovereignty, and says that the question of the constitutional form in which international authority should be established is one requiring separate consideration, and that it involves the finding of international equivalents for the factors known to national law as legislation, jurisdiction and execution. The finding of those equivalents had been described by Professor Lorimer of Edinburgh in his *Institutes of the Law of Nations*, published in 1884 as " the ultimate problem of international jurisprudence."

[2] *The Outlook for International Law.* By J. L. Brierly. (Oxford University Press: Humphrey Milford) 1944. 6/- Pp. 142.

The paper above referred to goes on to maintain that this means endowing the community of nations with a new system of international law based on the making of international statutes by a legislative authority, the interpretation and application of the law by an international court of justice at the instance of an aggrieved state, and its enforcement by executive power under international direction. It suggests that the legislative body must be suitably constituted for enabling it to legislate by means of statutes having a controlling operation over all international relations falling within agreed and prescribed limits. In order that it may have adequate authority for this purpose it ought to be composed of representatives of the governments of all the states sharing the responsibility for setting up the system, and forming and carrying on the union or organization for making, applying and enforcing the law (including such self-governing dominions as may be brought into that category), and in order that it may be able to act effectively and avoid risk of paralysis of its operations through the opposition of a single state or a small minority of states, it ought to be able to legislate by some reasonable majority. The voting power of the states in the legislative body ought to be based on a scale making some reasonable allowance for the disparity between the populations of the larger and smaller states so that every state may have some reasonable share in the exercise of the combined power. A specific proposal for such a scale is put forward as an illustration of what might be arranged. It is contended that, in fixing the extent of the field over which the legislative power should extend, regard should be had to the principle that it is undesirable, on the one hand, for international law to trespass further than is necessary on the freedom of the individual state or self-governing dominion to develop its own life and culture and pursue its own policies, but at the same time it is of overwhelming importance that the legislative power should cover all matters essential for securing and maintaining international peace and decent international relations, and taking collective measures for advancement of the general welfare and prosperity of nations.

It may be well to mention here that for the designing of an international legislative body the constitution of the United Kingdom affords, in one of its aspects, a useful precedent for consideration. Our Parliament legislates by two different processes for dealing with matters of two different types. By "Public Acts" it enacts general laws to govern the conduct of the population generally, and in the various stages of procedure in the passing of such Acts in each House of Parliament all members of the House are, generally speaking, entitled to take part, though at one stage in the House of Commons the detailed examination of the clauses of the Bill for the Act may be entrusted to a large standing committee of members. But we have also a process of legislation by "Private Acts," which deal with matters specially affecting the interests of particular localities or corporate bodies. Public notice has to be given of the intention to introduce the Bill for a Private Act, so that any parties whose interests may be injuriously affected will have an opportunity of submitting objections to Parliament. The Bill is "promoted" by some body or persons outside Parliament specially interested in securing its enactment, and it is introduced on a petition presented by such Promoters. In each House a small committee of members is formed which inquires impartially, like a judicial tribunal, into the subject matter of the proposed legislation, hears the evidence and arguments of the Promoters and any parties lodging petitions against the Bill, and allows, rejects or amends the Bill as it thinks just, subject to the final approval or overriding decision of the House of Parliament itself. This process of private legislation enables large organizations to be established and regulated, and large changes to be made in the legal rights and relations of important bodies to be made with general satisfaction, under something in the nature of a combination of legislative and judicial methods. A parallel need for dealing with special bodies and interests and effect-

ing " peaceful change " of existing rights or obligations and settling obstinate conflicts of policy or interest among nations might well be met by some parallel form of legislative procedure in the international field, under which matters calling for close examination of facts and circumstances and the views or interests of particular nations would in the first place be investigated by a small impartial tribunal, which would hear the parties concerned, but whose recommendations would afford foundation for an Act of the international legislative body carrying just as great authority and backing as a general international statute governing the future conduct of all nations.

In the same volume of *Transactions of the Grotius Society* (1943) there is an interesting article by Professor Lauterpacht on the subject of " The Rights of Man," as related to the law of nations and the law of nature. It deals largely with the past history of the subject, but contains also some observations about future possibilities from which the following passage, germane to the present topic, may usefully be quoted:— " It is only within the scheme of an over-riding international order that we can give reality to the otherwise contradictory notion that the supreme authority of the State is limited and that the rights of man must be based on that limitation. It is not enough to say that the law of the State is circumscribed by its purpose and by the external nature of its power. In that scheme of things the sovereign national State, whether or not it be the permanent form of the political organization of man, is not an end unto itself, but the trustee of the welfare and of the final purpose of man. In that scheme of things it would be for the international society to ensure the fulfilment of that trust through a fundamental enactment—an International Bill of the Rights of Man—conceived not as a declaration of principles, but as part of positive law, as part of the constitutional law both of States and of the society of states at large."

In the volume of *Transactions of the Grotius Society* for 1944 there is a paper by Wing-Commander W. J. Heyting, R.A.A.F., LL.B., under the title " The Organization of Post-War Peace," which contains a careful examination of many of the difficult questions involved in any plan for international organization designed to make aggression once and for all impossible. The author argues that the main essential is a permanent international peace force so overwhelming and so organized that it is never likely to be challenged, and a force which any potential aggressor will know is always ready and available and will be used in case of need. With regard to the difficult question of the civil control of such a force he says:— " That it has to be controlled by some civil authority is apparent; as it is clearly not a matter for the supreme commanders to decide when and against whom the force is to be used. These are questions in which the various national governments are directly concerned, not only because they have to contribute the money and the weapons which the force requires, but also because it is between their countries and their nationals that the force is designed to maintain the peace. Some permanent Council or Committee of Peace would have to be set up which would have to be composed of representatives of the various governments concerned, whose function it would be to decide the occasion for the use of the force, and whose decisions would be binding on and carried out by the force. If the claims for representation at the League of Nations and on the League Council after the last war are any guide, it is probable that the various governments concerned will want some form of equal representation. Such claims, however, overlook a number of rather important facts which may be briefly summarized as follows:

(1) national governments are only the representatives of the peoples they govern and it is they who are ultimately concerned with the issues of war and peace. It is therefore, on the face of it, contrary to all principles of democracy that the voice of a government representing a small community should count for as much, on as vital an issue as war, as the representatives of an infinitely larger

number of people. To give every government the same voice would amount to giving a minority of peoples the power to decide issues affecting the great majority;

(2) the relative contribution in money and equipment, in ships, aircraft, guns and all the other necessary weapons, which the various governments will be able to make, will not be equal, but will largely be related to the number of people they represent and the industrial resources and wealth of their countries;

(3) the geographically larger countries and those with greater industrial resources will have far more at stake, as this war has shown, than the smaller nations."

A little book entitled *The Atlantic Charter. New Worlds for Old*[3] comes from the pen of Professor Julius Stone of Sydney. It makes a general survey of that Charter in the light of the problems of the future peace, and the application of the terms of the Charter to the problems of South-East Asia and the South-West Pacific—the area immediately concerning Australia. It emphasizes that the greatness of the Charter lies not in any definiteness of plan or approach, but rather in the sober statement of a complex goal; it is a promise, not a fulfilment, a challenge, not an answer. It states unimpeachable objectives for the post-war world; to permit all nations to dwell in safety within their own boundaries; to permit all men to live in freedom from fear and freedom from want; that all nations shall come to abandon the use of force; and to establish a wider and permanent system of general security and lighten the crushing burden of armaments; but neither for the West nor for the East does it provide any clear political plan for achieving these most desirable ends.

Such a clear political plan as Professor Stone refers to must, in the view of the present writer, be not a plan for the West alone or a plan for the East alone. It must be a plan for a united world, recognizing not only that peace is indivisible, but that the foundations of security and economic welfare and international justice are indivisible also, and that this interdependent world can only be kept going on an even keel if by a general effort of co-operation there is established a central authority which can watch over the diverse needs and interests of all regions and peoples, and express and enforce effectively a common and united will to guide and control all those national activities and international relations which involve a risk, if they are not wisely guided, of landing us all in yet a third world war. The wheel has come full circle. The urgency of the need brooks no delay. The gravity of the danger leaves no room for half measures. The community of nations must at long last be made a real community with effective means of self-government. It must no longer be the sport of the rival interests and self-seeking ambitions of individual states or alliances. It must have the continuous protection and guidance and service of laws framed for the common good, adapted from time to time to common needs, and enforced by the common will and an organized common power. No instrumentality short of a dominating power of international legislation can effect these purposes. Lorimer was right in his description, already mentioned, of the ultimate problem of international jurisprudence, and who shall say that Lord Tennyson was not a true prophet, when in "Locksley Hall," written a hundred years ago, after an amazing prophecy of the coming of air warfare and civil air-transport, he went on to prophesy that the battle-flags would be furled in the Parliament of Man?

How far does the Charter of the United Nations, in the form in which it was signed at San Francisco on June 26, 1945, take us towards realization of the Tennysonian prophecy? In order to answer that question objectively it is necessary to take a bird's eye view of some of the main provisions of the Charter.

The General Assembly proposed by the Charter is to consist of all the mem-

[3] *The Atlantic Charter.* By Julius Stone, LLM., S.J.D., D.C.L., Challis Professor of International Law and Jurisprudence, University of Sydney. (Current Book Distributors, Sydney) 1945. Pp. 96.

bers of the United Nations (each having not more than five representatives) and is thus the body which one would naturally expect to occupy the highest level of the organization and serve the purpose of a legislative body. But the Charter gives it a very different status.

It is true that it may discuss any questions or matters within the scope of the Charter or relating to the powers and functions of any organs provided for in the Charter; that it may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments. But what may it do as a result of such discussion and consideration? It may merely make recommendations to the members of the United Nations, or to the Security Council, or to both, and it may not even make any recommendations with regard to a dispute or situation while the Security Council is exercising in respect of that dispute or situation the functions assigned to it in the Charter. The Assembly is to consider and approve the budget of the organization and apportion the expenses of the organization among the members, and it may call the attention of the Security Council to situations which are likely to endanger international peace and security; but the Charter provides that any question relating to the maintenance of international peace and security brought before the Assembly by any member or by the Security Council or by a non-member accepting the obligations of the Charter for the purposes of the dispute shall, if action is necessary upon it, be referred to the Security Council by the Assembly either before or after discussion.

The Assembly may also initiate studies and make recommendations for the purpose of—(*a*) promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; and (*b*) promoting international co-operation in the economic, social, cultural, educational and health fields, and assisting in the realization of human rights and fundamental freedoms for all, without distinctions as to race, sex, language or religion. But its power in regard to these important subjects goes no further than the making of recommendations.

Decisions by the Assembly on important questions are to be made by a two-thirds majority of the members present and voting; on other questions by a simple majority. Each member of the Assembly is to have one vote.

That being the position of the Assembly, what is the nature of the Security Council, to which its recommendations are to go? It is to consist of eleven members, of whom five will be the Great Powers—China, France, U.S.S.R., United Kingdom and United States of America. They are to be permanent members, and the remaining six will be elected by the Assembly for periods of two years.

Each member of the Security Council is to have one representative and one vote. Decisions on procedural matters are to be made by an affirmative vote of seven members. Decisions on all other matters are to be made by an affirmative vote of seven members including the concurring votes of the permanent members (which means that each of the five Great Powers would have a right of veto), except that in decisions under the provisions relating to the pacific settlement of disputes a party to a dispute is to abstain from voting.

It is declared that in order to ensure prompt and effective action by the United Nations its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. It is further declared that the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter.

In order to promote the establishment and maintenance of international peace

and security with the least diversion for armaments of the world's human and economic resources, the Security Council is to be responsible for formulating, with the assistance of a Military Staff Committee, plans to be submitted to the members of the United Nations for the establishment of a system for the regulation of armaments.

It is further provided by the Charter that all members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage necessary for the purpose of maintaining international peace and security. Such agreements are to govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. The agreements are to be negotiated as soon as possible on the initiative of the Security Council. They are to be concluded between the Security Council and members or groups of members and to be subject to ratification by the signatory States in accordance with their respective constitutional processes. Pending the coming into force of such of these special agreements as in the opinion of the Security Council enable it to begin the exercise of its responsibilities the five Great Powers are to consult with one another and as occasion requires with other members of the United Nations with a view to such joint action on behalf of the organization as may be necessary for the purpose of maintaining international peace and security. In order to enable the United Nations to take urgent military measures, members are to hold immediately available national air force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action are to be determined, within the limits laid down in the special agreements before mentioned, by the Security Council with the assistance of the Military Staff Committee.

Plans for the application of armed force are to be made by the Security Council with the assistance of the Military Staff Committee. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security is to be taken by all the members of the United Nations or by some of them as the Council may determine. Such decisions are to be carried out by the members directly and through their action in the appropriate international agencies of which they are members.

Provision is made for the maintenance of an International Court of Justice, as the principal judicial organ of the United Nations, in accordance with a Statute which forms an integral part of the Charter and is largely based on the Statute of the previously existing Permanent Court of International Justice. All members of the United Nations are to be *ipso facto* parties to the Statute of the Court, and to undertake to comply with the decision of the Court in any cases to which they are parties, but the jurisdiction of the Court extends only to cases which the parties refer to it and matters specially provided for in the Charter or in treaties and conventions in force, except so far as a State, party to the Statute, may at any time declare that it recognizes as compulsory, *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in the four recognized classes of legal disputes. An advisory opinion on any legal question may be sought from the Court by the General Assembly or the Security Council or other organs of the United Nations or specialized agencies so authorized by the General Assembly.

It is provided that, if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, " if it deems necessary," make recommendations or decide upon measures to be taken to give effect to the judgment.

Amendments to the Charter are to come into force for all members of the

United Nations when adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations, including all the permanent members of the Security Council (the five Great Powers).

A General Conference of the Members of the United Nations for the purpose of reviewing the Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. Each member of the United Nations is to have one vote in the Conference. Any alteration of the Charter recommended by a two-thirds vote of the Conference is to take effect when ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations, including all the permanent members of the Security Council (again, the five Great Powers).

If such a Conference has not been held before the tenth annual session of the General Assembly following the coming into force of the Charter, the proposal to call such a Conference is to be placed on the agenda of that session of the Assembly, and the Conference is to be held if so decided by a majority vote of the members of the Assembly and by a vote of any seven members of the Security Council.

Does the Charter, on this bird's eye view, appear such as to inspire any great hope of its providing a real insurance against future war?

What security is there that the five Great Powers, whose unanimity is essential to the successful working of the organization at all main points, will, on any particular question, agree quickly or easily, or even at all?

Will not the organization, because of the difficulty of obtaining unanimity, be at risk of attracting in time the same gibe as was cast at the League of Nations, that " it touched nothing that it did not adjourn "?

What security is there that the great mass of nations, other than the five Great Powers, will work contentedly under conditions which give so overmastering an authority to the great Five?

What security is there that the great conflicts of national interest and national ambition, which lie at the root of wars, and tend to agitate Great Powers at least as much as the Smaller Powers, will, under the processes of the organization, secure final decisions or settlements carrying such overwhelming authority and support and obtained with so little delay that they really will prevent war and provide an effective substitute for war?

What security is there that the plans for establishment of a system for the regulation of armaments formulated by the Security Council and submitted to the members of the organization will be any more successful than the plans discussed by the Disarmament Conference at Geneva?

Are the arrangements such that, if the need should arise for the organization to use collective force or pressure to control a particular nation or group of nations, the mass of drastic regulations and directions necessary to make the collective action effective will really be made and obeyed?

What security is there that the " special agreements " to contribute armed forces, assistance and facilities for the maintenance of international peace and security will actually be entered into on a scale sufficient to ensure that the use of collective force and pressure will prove effective when the time of need and stress arrives? Or that the Assembly will approve a budget sufficient to provide the vast expenditure which might prove necessary in order to control a serious challenge to the authority of the organization, and apportion the expenses in a manner acceptable to the permanent members of the Council?

Are the arrangements sufficient, in the absence of a system of legislation by majority, to deal successfully with all these matters, or to provide a suitable body of law to guide the decisions of the Court of International Justice, or to

ensure that the Charter itself will be amended when necessary to make it accord with changing international conditions and developing world opinion?

To the present writer at any rate it does not appear that the provisions of the Charter as now framed afford satisfactory answers to such questions as are posed above. The Charter does not at present contain provision for what seems to be the most fundamental requirement of all, namely (to repeat words used early in this article), " an international legislative body representing the various national states and allowing to each a voting power bearing some reasonable relation to its population and status: a body which will be able to reach decisions in a business-like way through use of a reasonable system of majority voting, and to which the national states will by agreement concede the sovereign power of control over such matters of international relationship as it may be necessary from time to time to regulate internationally in the interests of peace."

In designing the constitution of the United Nations arrangements for the exercise of international legislative power ought to have been the first care, since that is the agency through which alone the satisfactory working of the whole organization can be assured, and the necessary controls over harmful activities on the part of national states can gradually be developed.

BRITISH MAGISTRATES IN EAST AND WEST AFRICA

[*Contributed by* A. N. Doorly, Esq.]

The publication of Sir Alison Russell's handbook *The Magistrate* (Butterworth & Co. (Publishers) Ltd., 17s. 6d.), affords a suitable opportunity for some observations on the work and history of Magistrates' Courts in the British Dependencies in tropical Africa.

Although there is much in this book that cannot fail to be instructive to any person interested in or connected with the administration of justice in Courts of limited jurisdiction, it is clear that the writer has in mind particularly the Courts of Magistrates in the British Dependencies in East and West Africa and it is the Magistrates sitting in those Courts and the Police Officers associated with those Courts who will most benefit from the information and advice with which the book is copiously stored.

In East and West Africa, in the early days of British settlement or conquest, magisterial work was only a branch of the work of the administrative officer, who was variously called the Collector, the District Commissioner or the District Officer. Appointments to these posts were made by selection in England by the Colonial Secretary for West Africa and by the Foreign Secretary for Uganda and the East Africa Protectorate (now Kenya), after the Imperial Government had taken over from the Imperial British East Africa Company the administration of the territory on the East Coast of Africa which had been leased to that Company by the Sultan of Zanzibar. Later the Foreign Office handed over its responsibilities to the Colonial Office and now all the British Colonies, Protectorates and Mandated Territories in both East and West Africa are under the administrative control of the Colonial Office.

No legal qualification was required from candidates for appointment who were, as a rule, Honours men from the Universities with a sprinkling of older men who had retired from or resigned their commissions in the Navy or the Army.

It was not common to find a barrister or a solicitor holding one of these appointments so that as a rule the magistracy consisted of laymen, as was and still is the case in the Indian Civil Service.

Indian influence was strong in East Africa, partly from the fact that the British Government took over the government of the East African Coast from a Company with considerable Indian connections and partly from the fact that much of the labour for the building of the Uganda Railway was Indian. Many

of these labourers remained in East Africa as traders after the completion of the railway from Mombasa to Kisumu on the shores of Victoria Nyanza.

This Indian influence was to be seen in the application in the East Africa Protectorate, in Uganda and later in the Tanganyika Territory of the Indian Penal and Criminal Procedure Codes, the Indian Civil Procedure Code, the Evidence Act, the Contract Act and numerous other Indian Acts.

Further reference to these codes and their influence on the present law both of the East and the West African Dependencies will be made later.

The first Magistrate *de carrière* (if the expression may be permitted) appointed in East Africa was not a lawyer, but an experienced officer of the Indian Police whose duties were those of Railway Magistrate. Early in the present century, however, it was found necessary to appoint lawyers as Magistrates in the larger centres of population, though lay Magistrates continued and still continue to sit in the smaller towns.

The introduction of lawyers as Magistrates in West Africa came later than in East Africa, a fact which is somewhat surprising in view of subsequent history. That this was so was undoubtedly due to the influx of European and Indian settlers into East Africa, which naturally led to litigation between native and non-native and to suits of greater complexity than could adequately be dealt with by Magistrates unqualified in the law.

Cadets selected for administrative appointments now undergo a year's instruction in law (among other subjects) at Oxford or Cambridge at the conclusion of the usual University course and are required, within a year of their appointment, to pass an examination in law, the papers being set and corrected either by the Chief Justice or the Attorney General.

There has never been any argument about the wisdom of appointing qualified lawyers to be Magistrates in the larger centres of population in East or West Africa, but the question was hotly debated some years before the present war whether or not the aim of the Governments should be the appointment, as circumstances allowed, of professional Magistrates everywhere and the removal of Court work as one of the duties of Administrative Officers.

A strong point (apart from pure legal knowledge) in favour of the professional Magistrate is the fact that the Administrative Officer is sometimes prone to regard matters judicial too much from the executive point of view.

On the other hand the circumstances of many districts in the various Territories are such that a good knowledge of the natives and of their language is of vital importance and the Administrative Officer should be the better equipped in this respect.

The answer to the question has varied in the different Colonies and Protectorates. In the Gold Coast and Nigeria the decision has been on the whole in favour of the professional Magistrate. Nearly all the Gold Coast Colony and the whole of Ashanti are now within the jurisdiction of professional Magistrates; but the Northern Territories of the Gold Coast, where the natives are less sophisticated, remain under lay Magistrates. In Nigeria there has been a large increase in the number of professional Magistrates and in the area of their jurisdiction. In Sierra Leone there are professional Magistrates in the Colony, while in the Gambia there is but one professional Magistrate, in Bathurst.

One factor which facilitates the appointment in West Africa of professional Magistrates is the existence of a certain number of African barristers who are suitable for these appointments.

In East Africa it would seem that the question has not been answered definitely In areas settled by Europeans and Indians and in the larger towns professional Magistrates function, but in the native areas the District Commissioners still fulfil magisterial duties to the general satisfaction and they form the great majority of the magisterial Bench.

As time goes on, however, it is probable, as the recently published Report of the Parliamentary Commission on Higher Education in the Colonies under the Chairmanship of Mr. Justice Asquith points out, that there will be an increasing need in the Colonies for persons with legal qualifications and the African practitioner will, among other things, "provide the local source from which the magisterial and judicial establishments must be recruited."

The appointment as Magistrates of African lawyers, where this is practicable, may well supply the solution to the problem of obtaining Magistrates and Judges who, while professionally qualified for these offices, have in addition the inestimable advantage of knowing the language, the customs and the processes of thought of the local people.

In West Africa the appointment of Africans to the Bench is of long standing, particularly in the Gold Coast. In more recent times, an African barrister appointed as a Police Magistrate in 1919, was raised to the Supreme Court Bench of the Gold Coast in 1935 and performed the duties of that office with great distinction until his lamented death a short time ago. At the present time there are two Judges of the Supreme Court, five Magistrates and a Crown Counsel of African or partly African blood in the Gold Coast.

In the other West African Colonies matters are not so far advanced in this respect, but African barristers have been appointed to the magisterial Bench in Sierra Leone and it is only a question of time before appointments are made from their number to the judicial Bench. In Nigeria there is at present one African Judge and several African Magistrates.

The success of these appointments cannot fail to be a most important factor in the advance of the Colonies along the road to self-government.

The Governments of the Colonies have shown their readiness to make the appointments, and the rapidity or otherwise with which further appointments are made depends, partly on the manner in which those who have already been appointed meet the responsibilities of their offices and partly upon the supply of suitable candidates in the future. The omens are not unfavourable.

In East Africa it would not appear that the time is yet ripe for the consideration of Africans as professional Magistrates, although the striking success shown by some of the Native Administrations gives promise that, in the not too distant future, East Africans, whether Arabs or Africans, may with the appropriate training and education become fitted for magisterial appointments. The ability is there, but whether in the political and other conditions of East Africa such appointments would be practicable is a matter outside the scope of this article.

The existence of Native Tribunals or Native Courts is a factor in the consideration of the nature and scope of the work of Magistrates' Courts. Where such Tribunals and Courts exist, it is usual that their jurisdiction extends to the trial of the less serious criminal offences. This has in some cases the effect of reducing the work of the regular Magistrates' Courts.

So far as the civil jurisdiction of Native Courts or Tribunals is concerned, the channel of appeal is generally to the lay Magistrate (i.e., the District Commissioner or Provincial Commissioner) and thence to the Supreme or High Court or to the Governor or the Attorney General as the Governor's legal adviser. The Courts of professional Magistrates are not required to exercise jurisdiction, either originally or on appeal, in cases to which the native customary law is applicable.

With the expected increase in West Africa of qualified African Magistrates, the exclusion of the professional Magistrate from this jurisdiction would seem hardly justifiable for, as the Report of the Asquith Commission states:— "Some general knowledge of the usual or frequent principles of that (customary) law . . . and an acquaintance with the social conditions which it reflects are desirable as part of the equipment of the judges or officers presiding over Colonial Courts. . . . It is to the combination of a knowledge of the general principles of English

law and of the general principles of native customary law that we must look for the development of a body of Colonial law which, while adjusted to modern requirements, is at the same time adapted to the needs of different Colonial communities." Provided that he is a person of the requisite ability and character, the qualified African Magistrate would appear most likely to combine in himself the qualifications for the development and administration of the Colonial law on the lines set out above.

Sir Alison Russell's book is concerned principally with the administration of the Criminal Law and is primarily addressed to the lay Magistrate, though this is not to suggest that the professional Magistrate may not benefit by a close study of the book and by careful attention to the wise counsel to be found in its pages.

Owing to the increase in the number of legal appointments under the Colonial Office, the Colonial Legal Service was instituted. Members of this service are all barristers or solicitors and their duties are purely judicial or legal. They are almost invariably men who have practised in England, Scotland or Ireland or in one of the self-governing Dominions and are eligible for appointment or promotion to any judicial or legal post within the Colonial Empire. As a consequence it was found desirable that the laws of the Colonies relating to procedure and the penal law should follow as nearly as may be the law and procedure in force in England.

The application of the Indian Codes was therefore withdrawn in many territories where they had formerly been applied, but the benefits and advantages of having codes of law on these subjects were so well recognized that it was decided that each Dependency should have its own codes.

These local codes, although having a close general resemblance to each other, are not identical. The Penal Codes for the most part follow the common law of England as amended and amplified by the provisions of English Statute Law. The Criminal Procedure Codes also to a great extent set out the practice and procedure observed in English Courts, but where the circumstances of the Colonies were deemed to require more detail in regard to procedure than is provided in English law, that detail was in many instances found to be aptly and clearly supplied in the Indian Criminal Procedure Code. As a result, the Criminal Procedure Codes of many Colonies consist of an assimilation of English and Indian procedure, the proportion of Indian flavouring being naturally greater in those territories where Indian procedure was formerly followed.

These variations in detail are referred to by Sir Alison Russell and his book gives frequent warning that not everything he has written is to be taken as authoritative in regard to every Colony, and that his book must be recognized in every case to be subject to the local law.

The experienced Magistrate will have little difficulty in appreciating where these varieties in detail occur, but it is perhaps justifiable to give some examples for the benefit of new Magistrates and especially those who are laymen.

One such difference relates to the necessity for confirmation of Magistrates' sentences by the High Court. This is purely an East African procedure; there is no provision of the sort in West Africa where the safeguards against erroneous decisions consist of appeal, approach to the Supreme Court by way of case stated and the provision that the returns of Magistrates' cases (made monthly to the Supreme Court) act as appeals on which the Judge can act *proprio motu* and make any order which the justice of the case seems to require.

Another variation occurs on the matter of convictions and sentences on alternative charges. In the first paragraph on p. 41 Sir Alison Russell writes:— "When the offence is under the penal code and it is doubtful under which of two sections or under which of two parts of the same section of that code the sentence falls, the court must distinctly express the same and pass judgment in the alternative."

Conviction in the alternative is permitted by s. 236 of the Indian Code of Criminal Procedure, but the Indian cases on the subject show that the various High Courts are not agreed as to the circumstances in which the procedure may be followed. No such procedure is provided by any of the West African Codes, so far as the reviewer is aware.

Another matter worthy of comment is the difference between the law in the different Colonies in regard to the necessity for a Magistrate giving reasons for his judgments.

The precedents of cases in s. XXII all contain judgments in which the reasons for those judgments are set out, as is required by the law in East Africa. In some parts of West Africa there is no such requirement and it is not uncommon for Magistrates to do no more than record a verdict of guilty at the conclusion of a long and hotly-contested trial. This, though not illegal, may amount to a failure to comply with one of the foremost duties of any person connected with the administration of justice. As Sir Alison Russell states in the first paragraph of his book:—

"A Magistrate's first duty is to do what is right, and his second, hardly less important, duty is to satisfy the persons appearing before him that he has done so or at least that he has tried to do so."

These words, applicable as they are to judicial proceedings in any community, are of infinitely greater cogency in a country where the public, both in and out of court, is not as a whole very advanced and has not generally attained a standard of education sufficient to be able to appreciate without careful explanation the subtleties and finer points of the law.

It is true that a Magistrate may orally give reasons for his decisions without recording them, but it would seem to be advisable that the giving and recording of reasons for every judgment, whether in a civil suit or in a criminal prosecution, whether of guilty or not guilty, should be made compulsory by law.

The absence of reasons given must frequently lead to the mystification of the public and nothing is more deplorable than that any person interested in a judicial proceeding should be left mystified at its conclusion. A further point in favour of the recording of reasons for any judgment is the benefit which such a record gives to the appellate court in the event of an appeal.

It is believed that the matter is under the consideration of the Governments whose laws do not require reasons to be stated.

Sir Alison Russell's advice to Magistrates is invariably excellent. Particularly valuable is his warning of the importance of a Magistrate satisfying himself that a charge has been fully understood by the prisoner before a plea of guilty thereto is accepted.

In order that a prisoner may fully understand a charge, it is necessary that he should have explained to him every ingredient of the offence charged. Where an act becomes an offence only when it is done with criminal intention or knowledge, it is advisable that the Magistrate, after the charge has been read over to the prisoner, should direct that he be asked first whether he admits doing the act and if he does so admit, then secondly, whether he did the act with criminal intention or knowledge. For example, when the charge is one of receiving stolen property, the questions asked would be:— (1) Did you receive the property? (2) When you received the property, did you know it was stolen?

From the answers given to these questions, the Magistrate will be in no doubt whether the plea is one of guilty or of not guilty, and there should be no question but that the charge has been understood.

Sir Alison Russell's remarks on punishments, on juvenile offenders and on probation of offenders will be found to be most valuable. In regard to probation of offenders and juvenile offenders, Magistrates have in the past been much hampered by the absence of suitable provision in East and West Africa for the

exercise of reformative influences. The problem of juvenile delinquency in the larger towns is a serious and growing one. There are signs, however, that the Administrations concerned are beginning to realize the importance of these matters and both legislative and financial provision is being made for the setting up of juvenile courts, for the appointment of probation officers and for the establishment of remand homes and industrial and reformatory schools.

A word should also be said of the excellent advice to be found in this book in the sections devoted to Police Officers, which should be "read, marked, learned and inwardly digested" by every member of every Colonial Police Force.

It cannot be denied that in some parts of Africa the attitude of the public towards the Police leaves much to be desired. This regrettable state of affairs may be in part due to the occasional shortcomings of the lower ranks of Police Officers, but to a large extent the failure of the public to appreciate the true nature of the Policeman's duties is the cause for their non-co-operation. In these cases the public needs to be educated. Although it is too much to hope that Sir Alison Russell's book will find a circulation among the general public, the practice of the Gold Coast Police in broadcasting to the public on the nature of Police work and of the duties of the public in assisting in the maintenance of law and order and the preservation of the peace is recommended as an excellent means, where facilities exist, of converting public opinion in regard to an important branch of civic duty.

This book cannot fail to be of the greatest value to all those in the British African Dependencies who are concerned with the administration of justice and with the maintenance of law and order and its use as a handbook of advice and guidance is heartily recommended.

NOTES ON CANADIAN CONSTITUTIONAL LAW

[*Contributed by* PROFESSOR JOHN WILLIS]

A. Constitutional Cases arising under the BNA Act.

(i) *Taxing powers of the Provinces.* Because the courts have expanded the exclusive power of the provinces to legislate on "property and civil rights in the province" at the expense of the legislative power of the Dominion the increased responsibilities now expected of all twentieth century governments tend to fall in Canada on the provincial governments. Unfortunately for the provinces, their power to raise money to pay for these new responsibilities is limited by s. 92(2) of the BNA Act to "direct taxation within the Province" and any decision tending to extend their taxing powers is of importance.

Until *Atlantic Smoke Shops* v. *Conlon*[1] the requirement that any provincial tax be "direct" was commonly believed to render of doubtful validity any variety of tax that might be described as a sales tax, a matter of some importance to the provinces because a sales tax is both painless and moderately easy to collect. It was quite clear on the one hand that a sales tax imposed on a retailer (and *a fortiori* of course on the manufacturer or wholesaler) and intended to be passed on by him to the purchaser as a hidden part of the price was invalid as "indirect"; for, in the words of John Stuart Mill whose definition has been adopted by the courts in construing s. 92(2), it was "demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." It was quite clear on the other hand that a consumption tax levied on a purchaser after he had consumed the commodity purchased was valid as "direct"; for since the commodity purchased had been consumed and could not therefore be re-sold, the tax on it was incapable of

[1] [1943] A.C. 550; noted and fully discussed when before the Supreme Court of Canada in 20 *Canadian Bar Review* 157.

being passed on as part of any re-sale price and was therefore "one which is demanded from the very person who it is intended or desired should pay it." The tax in question in this case was a form of sales tax which had been adopted by most of the provinces for the purpose of taxing retail sales of gasoline and had here been applied by New Brunswick to retail sales of tobacco, and the idea behind it was to combine the practical advantages of the sales tax, painlessness and ease of collection, with the legal validity of the consumption tax; for the tax was levied on the purchaser in respect of the consumption by him of tobacco purchased by him from a retailer, such tax to be paid by the purchaser to the retailer, as agent of the government to collect it, at the time of the retail sale. Such a tax is obviously a retail sales tax in effect and properly described as such, and the problem before the Privy Council was whether in view of previous observations by it stigmatizing as "indirect" sales taxes or taxes on commercial dealings, this particular form of sales tax was invalid. The court held it valid because it was imposed on the last purchaser and he finally bore the burden of it; they disposed of the argument that this was a sales tax and as such necessarily indirect by pointing out that a sales tax is only indirect when in the normal course it can be passed on, and that this form of sales tax could not in the normal course be passed on, and they concluded by remarking that despite their previous observations a tax is not proved indirect by calling it a sales tax.

The requirement that taxation be "within the province" and the rule that the province cannot by its own legislation enlarge the ambit of its taxing powers under s. 92(2) of the BNA Act by giving to intangible property a situs within the province which it does not possess by the rules of common law[2] appears at present to put the provinces at the mercy of non-resident shareholders in a provincial company who do not want to pay succession duty to that province. Under the rule in *Brassard* v. *Smith*[3] their shares are "within the province" (and so taxable) where the share register is but many companies have now learnt to establish branch registries outside the province for their non-provincial shareholders, e.g., in the United States for their United States shareholders. The question is whether a province can counter what is in effect legislation by the company withdrawing from the provincial taxing power the shares of its non-resident shareholders by changing its Companies Act to provide that the shares of a member registered in a branch register shall on his death be transferable on the principal register within the province and not elsewhere, and so in effect bringing those shares back again within the provincial taxing power.[4] An interesting letter and comment thereon in the *Canadian Bar Review* indicates that the courts would probably regard such a change in the Companies Act not as valid legislation on the subject of incorporation of companies with provincial objects but as an invalid attempt to legislate on the situs of property for purposes of provincial taxation.[5]

(ii) *Supremacy of provincial legislatures when acting within the limits of s. 92.* "Within these limits of subjects and area the local legislature is supreme" said the Privy Council in 1883.[6] "Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament" said the Privy Council in 1938.[7] The principle is basic in the Canadian Constitution; it is a necessary consequence both of the desire of the colonies which federated under the BNA Act in 1867 to have, as the preamble to it recites, "a Constitution similar in principle to that of the United Kingdom" and of the fact that the BNA Act, unlike the Constitution of the United States, contains no Bill of

[2] *R.* v. *National Trust* (1933), S.C.R. 670, 673.
[3] [1925] A.C. 371.
[4] e.g., British Columbia Companies Act, Statutes of British Columbia, 1937, c. 10, s. 2.
[5] Legislative Interference with the situs of shares. 23 *Can. Bar. Rev.* 77, 167.
[6] *Hodge* v. *The Queen*, 9 App. Cas. 117, 132-133.
[7] *Shannon* v. *Lower Mainland Dairy Products Board* [1938], A.C. 708, 722.

Rights but merely divides the whole field of legislation in Canada between the Parliament of Canada on the one hand and the provincial legislatures on the other hand. In recent years however some Canadian courts have attempted to read into the BNA Act provisions similar to those of the Bill of Rights[8] and in *Abitibi Power and Paper Co.* v. *Montreal Trust Co.* one of the judges in the Ontario Court of Appeal held that "legislation in the province passed in respect to property and civil rights in the province must not be legislation aimed at a particular firm or corporation but must be general in character" and that for this reason alone a provincial Moratorium Act was, because in terms made applicable to Abitibi Corporation and it alone, beyond the powers of the Ontario Legislature. The Privy Council[9] has never countenanced any such attempt and found "no authority, and no reason for the opinion" expressed by the Ontario judge; it pointed out that the suggested restriction would be fatal to special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes and reiterated the proposition that "the legislature is supreme in these matters and not subject to control by the courts."

(iii) *Effect on the end of the war in Europe on the power of the Parliament of Canada to control prices and supply, labour and labour relations.* Unlike England where the relaxation of controls rests entirely with the government of the day and raises no legal questions, Canada must soon face the problem of how long these controls can constitutionally be continued into the post-war period. In "normal" times (and even a great depression is legally "normal") the power to regulate these matters falls within "property and civil rights" and belongs to the provinces which as a practical matter cannot in their nine petty principalities deal effectively with problems whose causes, or prescribe effectively remedies whose effects, are of necessity Canada-wide; for the Dominion can only embrace them in its power to legislate "for peace order and good government of Canada" in times of the gravest national danger and emergency and then only by laws which show no character of permanence but are merely transient in their nature.[10] At what moment will disappear the constitutional virtue which the war has infused into the Dominion and enabled it to carry out its anti-inflation and peace-in-industry policies? At the end of the emergency —that is clear; but who is to say when that moment has come? It cannot be left entirely to the Dominion, for that would enable the Dominion to endow itself with constitutional authority by its own say-so; it cannot be left entirely to the courts, for that would enable them to interfere in what is essentially a problem of statesmanship. Meanwhile, when Canada begins to return to a peace-time way of life, the enforcement agencies of the Dominion war-time boards of control will rely on the dictum of the Privy Council in the Fort Frances case that "very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of *ultra vires* which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite."[11]

B. Other constitutional cases.

(i) *Relation between the Canadian Government and the members of its armed forces.* As the late Professor Berriedale Keith indicated in his notes for 1943,[12] Thorson, J., of the Exchequer Court held in *MacArthur* v. *The King*[13]

[8] See Administrative Law and the British North America Act, 53 *Harvard Law Review* at pp. 257-259 and 271-274.

[9] [1943] A.C. 536.

[10] The law is summarized in Tuck, Canada and the Judicial Committee of the Privy Council, 4 *University of Toronto Law Journal* 33 at pp. 56-64.

[11] *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* [1923], A.C. 695, 706.

[12] 25 *Journal of Society of Comparative Legislation* 78.

[13] 1943, Ex. 77.

that the Canadian Government was not responsible for the negligence of a member of its armed forces. The ground of his decision was that such a person was not an employee; he was a person rendering his services as a soldier in the defence of his country pursuant to his duty of allegiance to the King; he was not therefore an "officer or servant of the Crown" within the section of the Exchequer Court Act which makes the Dominion Government responsible in tort for the negligence of its officers or servants. The only relevant English decision (*A.G.* v. *Valle-Jones*[14] in which MacKinnon, J., by allowing the British Government to recover for injuries caused to members of the R.A.F. by the negligent driving of the defendant civilian, in effect held that the ordinary relation of master and servant existed between it and the members of its armed forces) is not, however, noticed in the decision of the Exchequer Court and presumably was not cited there. In the 1943-44 session of Parliament the effect of this decision was nullified and the law in the Exchequer Court brought into line with *A.G.* v. *Valle-Jones*—and with common sense—by an amendment to the Exchequer Court Act which provides that "for the purpose of determining liability in any action or other proceeding by or against His Majesty a person who was at any time since (the date of the enactment of the relevant section) a member of the naval, military, or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown."[15] In 1945, and so subsequent to this amendment, the Dominion Government brought proceedings to recover for injuries caused to a soldier by the negligence of a defendant civilian. If it had sued in the Exchequer Court it must have been successful, for the amendment sets up the master-servant relation not only in proceedings *against* the Crown but also in proceedings *by* the Crown. It did however sue in an ordinary provincial court where, the amendment being applicable only to proceedings in the Exchequer Court, the common law applied and *A.G.* v. *Valle-Jones* was directly in point; both the trial judge and the court of appeal, however, refused to follow *A.G.* v. *Valle-Jones* on the grounds (a) that it could not be reconciled with Blackstone's discussion of the Military and Maritime States, and (b) that the Duke of Wellington could never have thought when he referred to the "cut throats" who composed some of his Peninsular forces that the relation of master and servant existed between his King and the men under his command; instead they adopted the reasoning in *MacArthur* v. *The King* and held that at common law the relation of master and servant did not exist between the King and an enlisted member of the armed forces.[16]

(ii) *Liability of members of the armed forces of the United States to be prosecuted in Canadian criminal courts.* In reference *re* Exemption of U.S. Forces from Canadian Criminal Law[17] the Supreme Court of Canada had to decide the difficult question whether there is extant in Canada any principle of public international law, recognized and adopted into the domestic law of Canada, which provides any exemption from the criminal jurisdiction of Canadian Courts to members of United States forces present in Canada with the consent of the Canadian Government for the purpose of military operations. As might be expected in a situation where it is necessary to reconcile a basic principle of domestic constitutional law that all citizens including soldiers are equal before the law with a basic principle of public international law (of which law our domestic law takes notice) that the inconvenience to a commander of a visiting foreign force of having his troops subject to domestic courts renders them immune therefrom, the court was by no means unanimous. The Chief Justice and Mr. Justice Hudson leaned heavily on the principle of equality

[14] (1935), 104 L.J.K.B. 358.

[15] Statutes of Canada, 1943-44 c. 25 s. 1.

[16] *Attorney-General of Canada* v. *Jackson* (1945), 2 D.L.R. 438 (New Brunswick Court of Appeal).

[17] 1943 S.C.R. 483.

before the law and held that, with certain very narrow exceptions relating to the case of offences committed on board an armed ship, United States forces are as fully subject to the Canadian criminal courts as an ordinary Canadian. Mr. Justice Taschereau and Mr. Justice Kerwin leaned heavily on the principle of inconvenience and held that they are exempt from criminal proceedings in Canadian courts but that this immunity may be waived in any particular case and that the powers of arrest, search, entry or custody exerciseable under Canadian law with respect to offences committed or believed to have been committed against that law are not interfered with. Mr. Justice Rand took a middle ground and held that they are exempt from criminal proceedings in Canadian courts for offences under Canadian law committed in their camps or on their warships (except against persons not subject to United States service law or their property) and for offences under Canadian law, wherever committed, against other members of their own forces, their property and the property of their own government, but the exemption is only to the extent that the United States service courts exercise jurisdiction over such offences; in all other cases, said he, they are subject to the Canadian Criminal Courts.[18]

Behind the puzzle presented to the Supreme Court lay a real psychological problem of satisfying at one and the same time the desire of the Canadian that the United States forces in Canada be subject to Canadian laws and the desire of the American that they should not be. The dry legal problem having been shown by this decision to be incapable of satisfactory solution by the usual judicial technique of a battle between conflicting ideologies, the officials of the two countries were then able to approach the psychological problem together in a practical way and work out an acceptable compromise. The solution adopted was to assume all United States servicemen to be subject to Canadian law but to provide (i) that when a United States serviceman is arrested by a Canadian policeman then, if he is (a) stationed in Canada or in Canada on military or naval duty, and (b) in uniform at the time of his arrest, the U.S. military authorities may on request have him released and the Canadian proceedings against him discontinued, and (ii) that United States service courts may try all members of its forces in Canada in respect of every offence committed by any of them in Canada.[19] So in theory they are now subject to Canadian law, in practice they are not.

(iii) *Liability of prisoners of war to be prosecuted in Canadian criminal courts for acts committed in the course of an escape.* The first question is one of jurisdiction—whether prisoners of war are immune from the municipal laws of the country where they are held prisoners. Mr. Justice Stephen thought that they were: for "protection and allegiance are co-extensive . . . and obedience to the law is not exacted in cases where it is avowedly administered, not for the common benefit of the members of a community of which the alleged offender is for the time being a member, but for the benefit of a community of which he is an avowed and open enemy."[20] The Ontario Court of Appeal has recently held that they are not,[21] on the grounds that there is no rule of customary international law exempting them and that the Prisoners of War Convention, 1919, so far from exempting them, expressly recognizes and regulates " judicial " proceedings against them in the country of detention. The second ground may not be quite sound for the references in the Convention to " judicial " as opposed to "disciplinary" proceedings would more naturally refer to military proceedings by formal trial before a court martial as opposed to military proceedings without formal trial before the camp commandant than to proceedings before the ordinary

[18] For full comment on this case see notes in 21 *Canadian Bar Review* 593, 665.

[19] See Order-in-Council *re* Legal position of members of the Armed Forces of the United States charged with having committed offences while in Canada, P.C. 9694, December 20, 1943.

[20] *History of the Criminal Law of England*, vol. 2, p. 8.

[21] *R.* v. *Brosig* (1945), O.R. 240.

courts as opposed to proceedings before the ordinary military authorities[22]—and if it is not, some future court will have to resolve the conflict between Stephen's principle, quoted above, and Dicey's principle, referred to in the comment on the position of United States forces above, that no persons in the country, not even the members of its own armed forces, are immune from ordinary criminal process.

The second question is one of substantive criminal law—whether an act which is part of and incidental to an attempt by a prisoner of war to escape is a crime at all. A prisoner of war owes a duty to his own country to escape and it may well be that he is no more liable for anything he may do in performing that duty than he would be for an act done during an actual battle. In the case before the Ontario Court of Appeal the magistrate had found as a fact that the articles stolen by the accused during his escape were taken for his own personal comfort and not for the purpose of aiding his escape, and the court did not therefore have to decide the point and expressly refused to venture an opinion on it. The question has, however, come up for decision in two magistrate courts, one in Ontario, the other in Alberta; the Ontario magistrate ruled that "a prisoner of war is not punishable for anything he may reasonably do to escape, or having escaped, to preserve his liberty"[23] but did not, unfortunately, consider the bearings of (if any), or even refer to, the Convention; the Alberta magistrate ruled that in view of the Convention the prisoner of war "is subject to the civil laws of this country for crimes committed while escaping or attempting to escape, or after he has escaped from lawful custody,"[24] but did not, unfortunately, distinguish the first question, that of jurisdiction, from the second, that of substantive criminal law.

(iv) *Liability to suit and taxation of Dominion Crown Companies.* S. 125 of the BNA Act forbids the taxation of any interests of the Crown and the Crown in the right of the Dominion cannot be sued in any provincial court but it can be reached both in contract and in tort by petition of right launched in the Exchequer Court. Even before 1939 there was a large and still growing number of what are sometimes called governmental proprietary corporations, i.e., corporations created or controlled by the government for the purpose of allowing the government to engage in business without subjecting the enterprise to the fetters, practical (such as civil service qualification or rates of pay for its employees, questions in Parliament on its day to day operations) and psychological (such as the conservative timidity regarded as proper for government but fatal for business) which would hamper it if it were part of the ordinary governmental machinery; familiar examples are the Canadian Broadcasting Corporation, the National Harbours Board, the Canadian National Railway. The war has seen not only the creation of many more of these corporations to carry out special war-time purposes, e.g., Wartime Housing Limited, Commodity Stabilization Corporation, but also a bewildering variety of new forms of government in business ranging all the way from the ordinary corporation which operates an industrial plant under contract with the Government on a cost-plus basis[25] through a corporation expressly formed by private capital for the purpose, which maintains, under contract with the government flying school instructors for members of the air force—the government providing the airplanes and a supervising officer[26]—to the familiar type of Crown company referred to above. In both classes of case the question always is whether the control exercised by the government over the activities of the corporation is extensive enough to render it an "agent of the Crown" and so bring it within the immunities from suit in the provincial courts and from taxation (in practice municipal taxation)

[22] See note, 23 *Canadian Bar Review* 451.
[23] *R.* v. *Krebs* (1943), 4 D.L.R. 553.
[24] *R.* v. *Shindler* (1944), 82 C.C.C. 206.
[25] e.g., *Montreal Locomotive Works* v. *Montreal* (1945), 2 D.L.R. 373.
[26] e.g., *Northern Saskatchewan Flying School* v. *Buckland* (1944), 1 D.L.R. 285.

enjoyed by the government in respect of its ordinary instrumentalities. Some of the recent cases on the subject are commented on in two notes in the *Canadian Bar Review*,[27] and, as one would expect from arrangements whose very purpose is to create an organization that is neither quite "government" nor quite "business" and has not yet settled into any uniform mould, these cases are hard to reconcile with one another. Paraphrasing the words of the writer of the second note, the decision in any case tends to depend on whether the court is more influenced by "the force of precedent buttressing a traditional attitude to the prerogative and militating against the imposition of liability not so clearly provided for as to be beyond all doubt" or by "the liberalizing tendency to subject Crown companies engaged in trade and commerce to the same legal processes which surround the private commercial corporation."

(v) *Miscellaneous.* The following additional topics have been discussed in the *Canadian Bar Review*; the applicability of provincial laws to the determination of the liability of the Dominion Government;[28] whether dominion or provincial procedure is applicable to the determination in a provincial court of a matter arising under a dominion statute;[29] the limited nature of the jurisdiction exercised by the courts in protecting political rights;[30] and finally, for those who are interested in civil liberties, a case on statute interpretation which involves the exemption from flag saluting of school children whose parents object to it on religious grounds;[31] the decision in this last case has, since the note, been reversed by the Court of Appeal[32] and is believed to be on its way to the Supreme Court of Canada.

NOTES

Sir William Malkin.—By the death of Sir William Malkin the Society has lost a valued member of the Council and Executive Committee. The tragic nature of the circumstances of his disappearance in a Liberator aeroplane of Transport Command as he was returning from the San Francisco Conference gave a sudden shock to his friends and colleagues. Others have paid tribute to his years of devoted service to the country in the Foreign Office. Here it is only necessary to place on record his unfailing hospitality when he welcomed the Committee around his table, charmingly bedecked with flowers. At all times Sir William was ready to co-operate in any undertaking, whether it might be to secure a reviewer or contributor to the *Journal* or bring a party of guests to the Jubilee Luncheon. The attendance at the Memorial Service at St. Dunstan's in the West, Fleet Street, on 25th July was an outward and visible sign of the high and universal regard in which he was held by a large circle.

Sir Arthur Quekett.—As Sir Arthur Quekett's service to the State has been inadequately recognized in the records of his death, Sir Cecil Carr has contributed the following article:—

By the sudden death of Sir Arthur Quekett our Society loses a good friend who had contributed the annual summary of the laws of Northern Ireland since its Parliament first sat in 1921. As the official draftsman at Belfast throughout that period, he could help us to appreciate the reasons for an enactment and its special points of interest and difficulty.

A Londoner by birth, Quekett graduated at Trinity College, Dublin, and was called to the bar by the King's Inns. In his early thirties he entered the service of the old Local Government Board for Ireland. Two thoughtful articles in the *Law Quarterly Review* in 1918 and 1919 showed his grasp of central and local administration; they dealt with delegated legislation and the provisional order system before these themes attracted other writers. Later, in the *Solicitors' Journal* for 1931, he had a useful note on the statutory phrase "shall have effect as if enacted in this Act." It contrasted the recent Yaffé case with that of *The Institute of Patent Agents* v. *Lockwood* in 1894. But his two volumes on *The Constitution of Northern Ireland* were his outstanding work; no one else could have

[27] 22 *Canadian Bar Review* 271, 927.
[28] 22 *Canadian Bar Review* 269.
[29] 23 *Canadian Bar Review* 159.
[30] 21 *Canadian Bar Review* 662.
[31] 22 *Canadian Bar Review* 840; *Donald* v. *Hamilton Board of Education* (1944), 4 D.L.R. 227 (Ont.).
[32] Not yet reported.

written with his authority and personal knowledge of the stages by which the Belfast government was set up and the departmental functions transferred.

The long ascendency of Lord Craigavon's premiership, and the deliberate policy of following the Westminster pattern, perhaps made his task as draftsman easier; but the numerous Irish Transfer Orders at which he worked with Sir Frederick Liddell and the late Sir Francis Greer were an exacting labour. The Government of Ireland Act of 1920 came at last to apply to the six northern counties only; had this been the sole area contemplated from the beginning, the devolution of powers might have been more generous. By a series of Northern Ireland (Miscellaneous Provisions) Acts, in which Whitehall made full use of Quekett's skill and experience, the restrictions were considerably relaxed. These operations were not so simple as they might appear. "Reserved" and "transferred" matters do not separate themselves comfortably in watertight compartments. Even so domestic a subject of law as workmen's compensation turned out to have its "reserved" elements. Quekett's mind was orderly and practical. Dealing with rules publication in 1925, he succeeded in harmonizing the widely different periods for laying rules before the Parliament in Belfast. A like step, recommended by the Committee on Ministers' Powers in 1932. has baffled Whitehall hitherto. Another move ahead of Westminster, not so sure perhaps of general acceptance, was his alternative to the citation of Northern Ireland Acts by regnal year and chapter, described in his last annual summary.

Though troubled by illness throughout 1945, he died in harness, on the eve of retiring with the happy prospect of well-earned leisure. Only a few days earlier he had completed two book reviews which appear elsewhere in this number. His place will be hard to fill.

Change of Address.—Owing to the accommodation in 28, Essex Street being required the Society has been obliged to move to The Old Gate House, Lincoln's Inn, W.C.2, which now becomes the address for editorial and secretarial communications. The building is one well known to all who have occasion to enter Lincoln's Inn from Chancery Lane, and the office of the Society is immediately above the archway.

The Legal Status of Lepers. — The widespread notion that lepers are in some way outside the law is based on the practice of the Middle Ages in Europe, when the burial service was read over these unfortunates, who were deprived of their property and driven out to fend for themselves with a bell and rattle to warn others of their approach. This was followed by a period of incarceration in leper houses.

Now leprosy is regarded as a disease which can be cured, or at least rendered uninfective, and leper hospitals have taken the place of the grim prisons of the past. Detention in the hospitals is for the most part voluntary, but segregation of infective cases, and removal of children from leper parents is generally enforced. Otherwise lepers enjoy ordinary civil rights to the same extent as other persons suffering from contagious diseases, but in Western Australia natives or aborigines applying for citizenship must now testify that they are not suffering from leprosy, syphilis, granuloma or yaws.[1]

There are still some parts of the world in which compulsory segregation is required by law and attempts are made to enforce it, notably Australia, Madagascar, Venezuela and Columbia, but in none of these places has there been any decline in the number of lepers, and the abandonment of compulsion in favour of the modern methods has given favourable results in many parts of the British Empire as well as in Norway, Dutch Guiana, Zanzibar and elsewhere. "That the old rigid system of universal life-long compulsory segregation now largely defeats its own purpose by causing the unfortunate patients to hide themselves for fear of its terrors is being increasingly recognized throughout the world, and it is not likely to survive for long."[2]

Preventive Acts have been passed in many parts of the Empire, notably India, Ceylon and the West Indies, but at the present time few of the more stringent laws are in force. The Indian Leprosy Act of 1898 enacted the forcible confinement of pauper lepers and restricted all lepers from engaging in certain trades, but the adoption of the Act was optional in the different provinces, and remained a dead letter in a large part of the country. In Bombay and Bengal, however, the Act has been put in operation and as recently as 1934 was extended in the latter province by a prohibition of lepers from sitting on Union, local and district boards.

India also affords an interesting example of ancient laws affecting the status of lepers. Under the oldest Hindu code, The Laws of Manu, no one suffering from incurable disease could inherit property, and this was ruled to include leprosy, but as far back as 1860 the British courts held that "it is a fact well-known in medical science that the disease of leprosy assumes in some cases a mild and curable form, while in others it appears in a virulent and aggravated type. The Sadr court finds on consulting

[1] Western Australia. Natives (Citizen's Rights) Act, 1944. No. 23.
[2] Introduction by Sir L. Rogers to *Unclean, Unclean*, by Paolo Zappa (1933), p. 23.

the best authorities on the subject, that it is in the latter case only that the disease is regarded by Hindu law as a disqualification entailing forfeiture of inheritance."[3] This view has been subsequently accepted by the Privy Council.[4]

A. G. P. PULLAN.

Legal Bibliographies.—Mr. Archibald MacLeish, formerly Librarian of Congress, pays a graceful tribute to Dr. John T. Vance in a volume surveying Anglo-American Legal Bibliographies. His sudden death in 1943 while occupying the post of Law Librarian was a serious loss not only to Librarianship but also to International relations. President Wilson appointed him to a post in the Customs in the Dominican Republic and after six years he took up the practice of law in Santo Domingo. This led Dr. Vance to a study of the laws of the South American Republics, which was further stimulated by a commission from Mr. Herbert Putman, then Librarian of Congress, to improve the Library's Section of Mexican Laws. As Law Librarian he inaugurated a series of bibliographies containing a mass of valuable information of which the two latest volumes deal with Colombia and the Dominican Republic and Haiti. Happily Dr. Vance inspired his own enthusiasm for legal bibliographic work in others and encouraged members of his staff to follow in his footsteps. An example is provided by one of his staff, Mr. William L. Friend who has produced a valuable annotated guide to Anglo-American legal bibliographies. (U.S. Government Printing Office, Washington, 1944.) The publication is particularly useful at the present time when the subject has been receiving attention in this country and guidance is needed to the available sources of information. The work is produced in the admirable format to which we are accustomed in the publications of the Library of Congress.

The guide to the law and legal literature of Colombia is the work of Mr. R. C. Backus and Mr. Phanor J. Eder, both members of the Bar of New York. The State is the chief of the five Bolivarian nations and was the first of the Latin American Republics whose Independence was recognized by the United States. It has been described as a constitutional democracy unique among the countries of South America. The contribution to legal science has been in producing a relatively large number of commentators and expositors without any one obtaining a pre-eminent position such as that possessed by Calvo in the Argentine. This work claims only to be a production of "two forasteros in hours snatched from professional activities" and is regarded as a means of stimulating the compilation of a bibliography by some Colombian colleague. Nevertheless, it is an admirable source of reference, for the material available and a systematic arrangement with information upon the different branches of law provides an invaluable source of reference. For example, the section relating to aviation is particularly interesting as the aeroplane has been of greater importance perhaps in the recent development of the state than it has been even for most of the other South American Republics. The explanatory matter gives particulars of the organizations engaged in promoting the service and also of the conventions regulating its relations with other countries. The section dealing with the Petroleum legislation also makes an interesting contribution to current problems. The wide range of information contained in the supplementary matter provided as a background to the bibliographical material is illustrated by the section devoted to Colonial Law where the surveyed collections date back to the year 1535.

The guide to the law and literature of Cuba, the Dominican Republic and Haiti is the work of Dr. Crawford M. Bishop, Director of the Centre of Inter-American Legal Studies, and Miss Anyda Marchant. The Centre was one of the activities which owed its establishment to the late Dr. John T. Vance. The legislative system of Cuba is derived from Spain. The Spanish codes were extended to the island by Spanish Royal decree. When the United States assumed control the Military Governor proclaimed the codes as remaining in force. More has been done in the publication of legal works and bibliographical material than in the case of Colombia. There have been various collections of the laws as well as of the codes, and the law reports with the digests are available in a continuous series since 1908. The interesting development in the legal system was the introduction of the writ of *habeas corpus* into Cuban law by an order of October 15th, 1900, issued by the American Military Government. The literature includes an interesting work of comparative study dealing with the legal capacity of the married woman, as it contains the history of her position in Roman and ancient law and in Spanish legislation accompanied by a comparative study of the law of Germany, Italy, France, England and Russia on the subject.

Legislation dealing with labour and social problems has been on a fairly extensive scale and such subjects as the eight-hour day and holidays with pay, minimum wage, the work of women and children, workmen's compensation, industrial arbitration, and employment agencies find their place from time to time in the legislation of the present century.

[3] Madras Sadr Diwani Adalat Reports, 1860, p. 238.
[4] Law Reports 51 Indian Appeals, p. 177.

In the Dominican Republic the basis of the legal system is derived from the French codes from the period when the Government was in Haiti. It is contended that there is very little indigenous law of any importance but there is still some influence of the Castilian law as on it was modelled almost all of the institutions of the law of the Indies. Similarly the judicial reorganization of the Dominican Republic is in its essential features a copy of the French. The following differences, however, exist from the French system:—

1. There is, in the administrative organization of the government, no court of general jurisdiction, like the French Council of State, with the result that all contentious-administrative matters that are not specifically assigned to the special administrative courts must be brought before the Courts of First Instance.

2. The Courts of First Instance have the powers of the French civil court, consulat de commerce, tribunal correctionel and the cours d'assise, and the jury has no place in these proceedings.

3. Litigation concerning rights in real property are withdrawn from the courts of ordinary jurisdiction and are delegated to the Tribunal de Tierras, as soon as the land in question has been registered in the land census.

4. All courts have jurisdiction to discard, in trying the cases brought before them, the application of any law which they consider contrary to the Constitution.

5. The local magistrates (alcaldes) have greater powers in France concerning police court matters.

In the course of the review of the books dealing with various branches of law, it is observed that an Institute of Comparative American Legislation was created in 1941. Under its establishment a series of lectures were delivered on American Constitutional Law which contained an analysis of the constitutions of each of the American Republics, and a comparative study on certain international aspects of their constitutional systems, including crimes on the high seas, execution of foreign judgments, extradition, aliens, naturalization, and diplomatic privileges.

The concluding portion of the volume is supplied by a survey of the law and legal literature of Haiti. There again the French influence is predominant. Various collections have been made of the laws enacted together with indexes but there appears to be no continuous series of the decisions of the Supreme Court.

The information provided in these two volumes shows that there is much to be derived from the study of the Anglo-American system of law. In this connection it may be hoped that the Inter-American Bar Association may be enabled to continue and develop its work. At the same time there is an opportunity for lawyers in Great Britain and other parts of the British Empire to take a more active interest in the legal systems of the South American states, especially at a time when there are prospects of greater commercial intercourse.

Ideas in American Legislation. — The Library of Congress publishes through the Legislation Reference Service a review of laws enacted during the biennium, which is like the introduction to the Review of Legislation published by the Society but on a much larger scale. The latest issue contains the current ideas covered by the Legislation of 1942 and 1943. It would not be possible to make a further summary of what is already a much condensed and closely packed publication, it must suffice to say that the subjects are classified under nine main headings as follows:— Federal-State Relations; State and Local Governments; Social and Police Measures; Court Administration and Property Rights; Health and Welfare; Education; Conservation and Agriculture; Labour; Business, Industry and Professions.

As an illustration of the contents of each and the method of treating them a quotation may be made from the section dealing with Social and Police Measures.

"*Amusements.* It would seem that the reaction to war conditions was to liberalize restrictive provisions in the laws regulating amusements. The number of days on which horse racing is allowed was increased in four states, the extention limited to the war period in three of them. Massachusetts prolonged the permitted racing day and New Hampshire authorized pari-mutuel pools through 1946. Nevada authorized dog races. Sunday bowling hours in Maine and increased hours for double-header baseball games on Sundays in Massachusetts are concessions "for the duration" only. North Dakota authorized Sunday bowling and New Hampshire permitted earlier opening of theaters on Sunday without restricting these laws to war years. In Oregon the boxing commission may permit more than five additional rounds in championship boxing contests. In Pennsylvania the athletic commission may permit persons under sixteen to compete in amateur boxing and in several states minors may now be employed in bowling alleys (see s. 62, supplement). Puerto Rico authorized the sports commission to direct amateur as well as professional sports and Missouri declared the jurisdiction of the athletic commission to extend to wrestling. Proper control of skiing is to be studied in New Hampshire. Maine authorized beano and Massachusetts repealed her authorization. Nevada's athletic commission is to see that contestants in

boxing and wrestling matches get a share of the receipts and California sought to prevent another type of fraud through regulation of possession of anæsthetics within racing enclosures. New York required affidavit of citizenship of persons employed at harness races and exempted persons in uniform from admissions tax and permitted admission at half-rate to horse and harness races. Puerto Rico imposed a tax on admissions to entertainments and Puerto Rico and South Dakota imposed sales taxes on slot machines.

"*Interracial Relations*. An innovation appearing in the civil rights law makes punishable discriminations on account of 'national origin.' Commissions in Connecticut and Massachusetts are to investigate discriminatory practices in relation to race, with emphasis on opportunities for job training and placement in Connecticut, and including 'colour, religion or nationality' in Massachusetts. A special division for enforcement of civil and equal rights was created in Illinois where one day is set aside as Freedom Day for the observance of fair treatment towards all, and another as Equal Rights Day. Indiana commended groups in the state working toward economic freedom without discrimination. Criminal liability attaches in Massachusetts for malicious publication of matter intended to promote racial or religious hatreds but prosecutions may be instituted only through official channels. Alabama empowered Birmingham 'to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of the inhabitants, and to prevent conflict and ill feeling between the races' by zoning on racial lines. Texas declared it the policy of the state that equal privileges shall be accorded in all public places of business and amusement to all persons of the Caucasian race. Here and in Arkansas the segregation law was applied to motor busses while Puerto Rico re-enforced the prohibition on discrimination 'in public places and businesses and in the means of transportation.' The penalties of anti-discrimination laws were applied to golf courses, amateur athletic contests, and state-aided child-care institutions in New York, to the state guard and to labor organizations in Pennsylvania, to lease of municipal buildings in North Dakota, to air-raid shelters in New Jersey. Nebraska and New Jersey prohibit private employers engaged in defense work from excluding persons from employment because of race, creed or colour. Illinois wants Congress to inaugurate a national program similar to a pageant enacted in the state entitled 'Americans All —Immigrants All'."

The former of the two paragraphs illustrates in a rather remarkable manner the effect of war and the latter covers an important national problem which is of considerable interest in other parts of the world. It should be added that there is an index to the State Laws published also by the Library of Congress so that references are readily obtainable to the actual text of the laws for those who desire to pursue the information contained in this publication.

International Parliamentary Counsel. — For some years the International Labour Office has been engaged in printing model laws and the basis for legislation in a series of valuable publications. To this work Mr. C. Wilfred Jenks has paid special attention as their Legal Adviser. In the American Journal of International Law (vol. 39, No. 2, April, 1945) he sets forth the case for an International Legislative Drafting Board. "Such a bureau," he says, "would be an international equivalent for the Parliamentary Counsel's Office in the United Kingdom and the legislative reference and drafting services which have been developed in the United States and might be appropriately described as the International Parliamentary Counsel's Office." In detail he describes the special difficulties involved in dealing with material in a number of different languages. The admirable International Labour Code published in 1939 contained a number of notes drawing attention to significant similarities and contrasts in conventions dealing with related questions. Such details are part of the larger problem of securing that the decisions reached and the proposals formulated are set forth in a form which is satisfactory from a drafting point of view. Upon that point Mr. Jenks observes:

"Legislative draftsmanship is not an art which can be reduced to a few simple rules and then practised without any further difficulty if adequate works of reference are available, even within a national milieu and when only one language needs to be considered. Multilingual drafting is a highly specialized craft. It is largely because it has not been sufficiently recognized as such and has been attempted by many an inexpert hand that the general standard of draftsmanship of international instruments has remained poor. The second and main purpose of the proposed International Parliamentary Counsel's Office would be to make a high standard of skill available for the drafting of all multipartite instruments. It is self-evident that the services of such an Office would not always be used, even in cases in which no other satisfactory arrangements existed. Political prejudices, administrative exclusiveness and last-minute improvisations would continue to play their accustomed part in making the

task of endeavouring to improve international legislative draftsmanship a difficult one, but the existence of improved facilities for the drafting of multipartite instruments should gradually exert a substantial influence. These facilities might also be employed from time to time for the drafting of important bipartite instruments likely to be widely used as models."

The extent of the contribution which could be made by International agreements and conventions in providing the basis for national legislation would be increased by attention to their legislative technique which is in general little appreciated by the politicians who have so much to say in formulating them. Nevertheless, Mr. Jenks presents a strong case for giving to the International Parliamentary Counsel "a place and status in the general structure of world institutions which will afford him adequate opportunities of influencing the future development of international legislative technique."

Legal Aid.—Particulars have been given from time to time in the pages of this Journal of the arrangements made for providing legal aid in different parts of the Empire[5] and in the United States.[6] It is only necessary, therefore, to supplement them by giving some extracts from the report of the Committee appointed by the Lord Chancellor under the chairmanship of Lord Rushcliffe (Cmd. 6641 H.M.S.O. 9d.). The Committee surveyed the history of legal aid and advice in England and Wales, which extends over a period of 150 years, and they were impressed by the evidence of the need "for a new approach to the whole question of legal assistance." Admirable work has been done by Poor Man's Lawyers and Legal Aid Centres but the demand has so increased that the total of all the existing free facilities is inadequate to meet it. The generosity of the legal profession is recognized and at the same time it has become clear that it has reached the limit of any reasonable expectation. The Committee accordingly enunciate a series of basic particulars upon which they construct a scheme for future administration. They are as follows:—

(1) Legal aid should be available in all courts and in such a manner as will enable persons in need to have access to the professional help they require;

(2) This provision should not be limited to those who are normally classed as poor but should include a wider income group;

(3) Those who cannot afford to pay anything for legal aid should receive this free of cost. There should be a scale of contributions for those who can pay something towards costs;

(4) The cost of the scheme should be borne by the State, but the scheme should not be administered either as a department of State or by local authorities;

(5) The legal profession should be responsible for the administration of the scheme, except that part of it dealt with under the Poor Prisoners' Defence Act;

(6) Barristers and solicitors should receive adequate remuneration for their services;

(7) The Law Society should be requested to frame a scheme on the lines outlined in our detailed recommendations providing for the establishment of Legal Aid Centres in appropriate towns and cities throughout the country;

(8) The Law Society should be answerable to the Lord Chancellor for the administration of the scheme, and a certain Advisory Committee should be appointed to advise him on matters of general policy;

(9) The term "poor person" should be discarded and the term "assisted person" adopted.

The Committee discussed the case for the scheme to be administered either by the State or by the Local Authorities. In agreement with the difficulties of either they came to the conclusion that any scheme must be organized through the Legal Profession, though the Legal Aid provided in Criminal Courts falls into a different category as in a large measure it is already subject to statutory rules. In setting forth arrangements under which legal aid can be provided in civil cases they have adopted an ingenious system of calculations by which to extend the assistance in accordance with their fundamental particulars to a wider income group. They provide for a certain latitude in giving discretion to the Law Society but they laid down rules which involve enquiries into the extent of the applicant's financial resources both as regards his income and capital available as well as his expenditure. In doing so they recognize that there are sections of the community, for example, a small shopkeeper, whose financial standing may be very difficult to determine precisely. On the whole, however, instead of the very small limit of income that is necessary under present conditions, the Committee are in favour of making the service available to those who have incomes under £420, which is the same as the present Health Insurance limit.

The great development of the work has been due very largely to matrimonial causes. That unfortunately seems likely to continue irrespective of any increase of facilities. So soon as they are in operation and have the confidence of the community they may

[5] *Legal Aid for the Poor*, by A. H. Hassard Short, Vol. xxiii, pp. 27, *et seq.* *Legal Aid for the Poor in South Africa* by J. D. Hayman, Vol. xxvi, p. 12.

[6] *Legal Aid Work in the United States*, by John S. Bradway, Vol. xxiv, pp. 57 *et seq.*

lead to a considerable increase in litigation upon other matters. The proposals cover the whole range of jurisdiction in all the tribunals of the country and the committal of the undertaking to the Law Society, representing the solicitor branch of the profession, in consultation, of course, with the Bar Council representing the barristers, is a recognition that an undertaking of this kind can best be carried out by a responsible professional body whose organization, through means of local societies and distributed throughout the country, provides the necessary facilities. At the same time it is recommended that the Lord Chancellor shall have an Advisory Committee with the following functions:—

(1) To consider the interests of the citizen in relation to the scheme and to advise on matters of general organization;

(2) To consider and recommend on any questions of policy and administration submitted to it by the Lord Chancellor;

(3) To consider and report to the Lord Chancellor on an Annual Statement to be submitted by the Law Society on the working of the Scheme.

The Treasury also have some interest in the subject as the finance, however modest the scale may be of remuneration to the members of the legal profession, must involve a substantial expenditure. During 1944 the cost of the Poor Persons' Scheme as administered by the Law Society was £42,339 of which sum £30,789 was expended on the Services Divorce Department. The organization of Legal Aid for the members of the Forces, both men and women, has been so admirably carried out that large numbers of the community have no doubt appreciated the facilities for obtaining legal assistance in other difficulties to an extent which they have never known before. Although it is very difficult to make any exact estimate, the Committee have suggested that the cost of maintaining the proposed administrative machinery would be slightly under £200,000 a year. The wide experience contained in the membership of the Committee provides assurance that the proposals embodied in their report are sound and deserve to be put into operation.

The extent to which Legal Aid is being extended in different parts of the Empire is illustrated by the report in the *Bombay Law Journal* (vol. xxiii, p. 311) of the twentieth Annual General Meeting of the Bombay Legal Aid Society. The President, Mr. F. A. Vakil, made a strong appeal for further support as the work already accomplished had shown its value. The conditions there provide their own especial difficulties, of which examples were given by the Honorary Secretary, Mr. N. H. Pandia, as follows:

"In some cases, applicants have gone round all available lawyers and it is only when they have all given up the matter as entirely hopeless as being unsustainable in law, that the applicants bring their matters to us. In some cases applicants have employed lawyers and paid for their services, until a stage is reached when the demand of the lawyers for further fees is greater than the supply available in the client's pocket and then the applicant comes to us to proceed with his matter without making any charge. In some cases, applicants think they know the law and desire us to take legal steps in the matter in the way they desire. Notwithstanding the fact that their knowledge of the law is all wrong, when we tell them that the law requires particular steps to be taken in their matter, they abuse the Honorary Secretary. In some cases, clients come to us at the very last moment, e.g., a day before the trial of their case in Court, and desire us to appear and conduct their case in court the next day. When we tell them that they do not leave us sufficient time to consider their application for legal aid and to study their matter, they retort: 'What is your Society for?' Some applicants come to us and insist that their matter should be handled by one or other of the leading lawyers of Bombay. They make it clear that they will not put up with any junior member of the Bar. Perhaps the worst class of applicants is that which brings in the communal question in accepting legal aid. An applicant saw me and insisted on the applicant's case being conducted by a solicitor and a counsel belonging to his own community! Whenever we find cases truly deserving legal aid and advice, we give it without difficult or undue delay and many are the blessings which grateful clients shower on the Society, for free legal aid rendered."

English Law in Turkey.—In order to extend the knowledge of English legal principles the British Council have arranged for the publication of an English Legal Bulletin in Turkey. Professor Parry who holds a Chair of Law in the University of Ankara is responsible for the publication, and the translation has been revised by Bey Turgut Erem, the first educational attache appointed to the Turkish Embassy in London. The first issue deals with such subjects as the organization of the Courts in England, the citation of English authorities and the prolongation of Parliament.

Social Legislation in Poland.—The Polish Lawyers Association has published an informal and informative talk given at the Allied Lawyers' Foyer by Dr. Bloch on Social Legislation in Poland. Contrasting conditions in Great Britain and his own country, Dr. Bloch

found that there has been more necessity to resort to legislation as employers and employed have not developed their own organizations to the same extent in Poland as to enable reliance to be placed upon collective bargaining. Accordingly there has been established a body of labour legislation containing all those items such as holidays with pay, which included for intellectual workers a fortnight's continuous holiday after six months' service and one month's holiday after each year of service. By a decree of March, 1928, the legislation established the principle that a contract of employment could not be less favourable to the worker than the rights conferred upon him by the law. By this means the length of notice to terminate the contract, namely three months for intellectual and a fortnight for manual workers, could not be curtailed by agreement, nor could the statutory remuneration in lieu of notice be reduced. These provisions gave rise to a certain amount of litigation for which special labour courts were set up and composed of a President—a professional Judge—and two assessors appointed on the recommendation of the trade unions and employers' organizations.

Dr. Bloch concluded his talk with a description of the social insurance system in Poland, so that his paper provides a useful and illuminating record of the legislation relating to the social conditions in that country

Law in Chile.—Dr. Mario Tagle-Valdes contributed to *Law Notes* of February, 1945, which has kindly been sent by the representative of the British Council, an article describing the legal system of Chile, from which the following extracts may be of interest.

" The ' Organic Law of Tribunals,' of October 15, 1875, created the different classes of judges and courts and assigned to them their respective functions and attributes. Just as the Courts may not intermeddle in, or encroach upon, the functions of the other Powers of State, so it is forbidden to all other State authorities to interfere with, or encroach upon, the judicial function. Thus there has been realized the ideal of total and effective separation and independence of the three Public Powers, the executive, legislative and judicial. This independence is even more absolute since the Constitutional Reform of 1925 abolished the former Council of State."

" The highest judicial authority is the Supreme Court of Chile, which functions in Santiago, capital of the Republic, and is composed of thirteen judges. . . . To this court is entrusted the correctional, disciplinary and economic jurisdiction over all Tribunals of the Nation. Finally, since the Constitutional Reform of 1925 the Supreme Court has the power of declaring void and without binding force any law of the Republic on account of the defect of unconstitutionality; but its decision in this respect is to have effect only in the causes between private individuals in which the issue is raised."

Dealing with the laws of the country Dr. Tagle-Valdes describes that the genesis of the general law goes back to the thirteenth century. " The ' Lawyes de Partides,' the celebrated ' Siete Partidas ' of Don Alfonso el Sabio constituted," he claims, " the most justice-promoting and excellently elaborated Code of positive legal provision that has ever existed in any country on earth. Numerous other bodies of law, all of Spanish origin, affected not only our customs and everyday affairs, but also our criminal jurisprudence and our procedure both civil and penal, during our whole Colonial period and for many years of our independent national life."

" It was only after the first third of the last century that Chile began to give herself laws which were truly her own and which displayed a general national character. The Civil Code of Chile, drawn up by the eminent Venezuelan sage of the law, Don Andres Bello—at the service of Chile—and promulgated on December 14, 1855, marks a new era in the juridical culture of our country. This truly marvellous Code took its inspiration from the substantive culture of our Mother country, Spain, adopting at the same time numerous important subjects, as well as the doctrines and methods of the Code Napoleon. It abolished the force of law which had been attributed to customs, vigorously organized the family, creating well defined statutes for legitimate children and natural children; it gave a solid basis for immovable property (realty)—the chief foundation of private and public wealth—creating the Registry of the Conservator of Real Property and the ' inscripcion,' recording of real rights, it promoted the liberty of disposing of property by will to the point of greatest freedom consistent with our customs; it organized with the most meticulous care the guardianship of those not ' sui juris,' and the conservation of their estates, and in accord with the most precise and modern juridical notions, it classified all the various forms of contracts, especially those governing societies (partnerships and corporations) and the accessory contracts of ' hipoteca ' (mortgage), and ' prenda ' (pledge), which have been called upon to lend such valuable assistance to the increase of public and private wealth."

Proceeding to deal with the Commercial Law, Dr. Tagle-Valdes describes the Code of 1865 as the most complete, prolix and up-to-date body of law promulgated. " Nothing seems," he says, " to have escaped the foresight and accurate judgment of the authors of this most extensive code which, complemented only by some accessory or auxiliary laws,

continues, down to the present day, to govern and control all the commercial activities of our country."

Ten years later the penal code was adopted and modernized the ancient Spanish law on crimes and their punishment. This code too, it is claimed, " was a most progressive work upon its assigned subject, from the standpoint of its doctrine as well as of its classification of offenses and their penalties; and it placed our penal laws upon a plane which makes them a model among the codes of this class. It may be said in its honor that it remains in force, after three-quarters of a century, without necessity of modification or amendment in any of its substantive portions."

In connection with the system of legal education, Dr. Tagle-Valdes gives particulars of the College of Advocates and describes the arrangements made for free legal aid bureaus. " They are manned and serviced," he explains, " by those graduate students who have already received the title of ' Licenciado en Leyes,' since it is obligatory upon such graduates to work free for the poor during a period of six months before applying for the title of ' Abogado.' In this manner the young ' Licenciados ' make contacts with the profession, learn juridical problems at first hand, gain some degree of experience and, at the same time, render a service to the community by their gratuitous and obligatory practice. It is needless to point out the splendid results that this institution has had for the entire country."

The Status of Ireland.—In the course of a speech on July 17, 1945, on the Vote for External Affairs in the Dáil Eireann, Mr. De Valera, in his capacity as Minister, made the following statement:—

" Last week Deputy Dillon wanted to know if we were a republic, and pretended that I was the only person who knew the answer. He asked in fact two questions, one of which was easy to answer, the other not so easy. He asked was this State a republic, and were we a member State of the British Commonwealth. When I told him that we were a republic his surprise was, as a friend remarked, like that of Moliere's Bourgeois Gentilhomme when he learned that he had been speaking prose all his life. Of course the pretence that I alone could answer is plainly ráiméis. The State is what it is, not what I say or think it is. How a particular State is to be classified politically is a matter not to be settled by the *ipse dixit* of any person, but by observation of the State's institutions and an examination of its fundamental laws.

" Our one fundamenal law is the Constitution. A written Constitution, it was submitted to and enacted by the people in a plebiscite taken on adult suffrage on July 1, 1937. It came into operation on December 29, 1937. The first President, Dr. Hyde, entered upon office on June 25, 1938, and the organs of State provided for by the Constitution were all fully functioning from that date. A period of three years was allowed during which with the President's consent amendments to the Constitution might be made by the Legislature simply. That period has long since expired, and no change in the Constitution can now be made except by a vote of the people in a Referendum.

" Let us glance for a moment at some of the provisions of that fundamental law so that we may realize its character, and the character of our State. Article 5 declares the State to be " sovereign,' ' independent ' and ' democratic.' Article 6 (1) declares that ' all powers of Government, legislative, executive and judicial, derive under God from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy according to the requirements of the common good.' Article 6 (2) declares that ' these powers of Government are exercisable only by or on the authority of the organs of State established by this Constitution.' Article 12 provides for a President to be elected by direct vote of the people for a period of seven years ' who shall take precedence over all other persons in the State and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by law.' Article 15 states that the National Parliament shall consist of the President and two Houses—the House of Representatives, Dáil Eireann, and a second, Seanad Eireann—constituting, all three together, the Oireachtas, in which is vested ' the sole and exclusive power of making laws for the State.' Article 28 provides that ' the executive power of the State shall, subject to the provisions of this Constitution, be exercised by, or on the authority of, the Government.'

" The State whose institutions correspond to these Articles is, it seems to me, demonstrably a republic. Let us look up any standard text on political theory, look up any standard book of reference and get from any of them any definition of a republic or any description of what a republic is and judge whether our State does not possess every characteristic mark by which a republic can be distinguished or recognized. We are a democracy with the ultimate sovereign power resting with the people—a representative democracy with the various organs of State functioning under a written Constitution, with the executive authority controlled by Parliament, with an independent judiciary functioning under the Constitution and the law, and with a Head of State directly elected by the people for a definite term of office.

" To save members of the Dáil the trouble of looking up references, I have collected a few. I give first a relevant passage from the *Encyclopedia Britannica* (14th Edition):—

> '*Republic*.—A state in which the supreme power rests in the people, or in officers elected by them, to whom the people have delegated power sufficient to enable them to perform the duties required of them. In the small republics of antiquity the people usually expressed their preference directly, but in the larger republics of modern times representatives are elected to sit in law-making bodies. The Head of the State is usually elected directly, and in modern usage this fact distinguishes a republic from a monarchy in which the Head is hereditary. . . .'

" The *Encyclopedia Americana* (1937 Edition) says:—

> '*Republic*.—A word signifying a State in which the people are the source of power.'

" I give next a similar passage from the *Shorter Oxford English Dictionary* (2nd Edition):—

> '*Republic*.—A State in which the supreme power rests in the people and their elected representatives or officers, as opposed to one governed by a king or the like; a commonwealth.'

" Here is what Webster's *International Dictionary* says:—

> '*Republic*.—A State in which the sovereign power resides in the whole body of the people, and is exercised by representatives elected by them. . . .'

" The following is from the New Standard Dictionary of the English Language:—

> '*Republic*.—A State in which the sovereignty resides in the people and the administration is lodged in officers elected by and representing the people; a representative democracy . . .'

" It goes on to say:—

> 'Republics had their origin in opposition to hereditary monarch, as in Greece, Rome and America, and their essential features have been the control of the executive by election and by laws proceeding from assemblies of enfranchised classes. . . . Nearly all modern republics have a written constitution, practise manhood suffrage, vest sovereignty in the voters, choose the executive indirectly, as by some form of electoral college, or by the legislature, as in France or Switzerland, and entrust legislation to two co-ordinate chambers or houses, while the judiciary forms a co-ordinate branch of government, invested with power to pronounce on the constitutionality of laws and of executive acts. . . .'

" Chambers's *Dictionary* has the following:—

> 'Republic is the form of government without a monarch in which the supreme power is vested in representatives elected by the people.'

" Dictionaries and encyclopedias in other languages give definitions and descriptions in no wise essentially differing from these. If anyone still persists in maintaining that our State is not a republic I cannot argue with him, for we have no common language. There is no common set of words and ideas between us.

" A republic is sometimes defined as a democratic contrast to a monarchy. Is it suggested that we have a hereditary ruler or monarch in our State? It would indeed be strange if we were a monarchy and our fundamental law did not show the monarch as an integral part of either our legislative, our executive or our judicial authority. This is where the monarch functions in all monarchial States.

" Is it argued that, because we have the External Relations Act of 1938, our State is a monarchy? I do not think any constitutional lawyer of repute would attempt to maintain such a thesis. By this Act, so long as we are ' associated with the following nations, that is to say, Australia, Canada, Great Britain, New Zealand and South Africa, and so long as the King, recognized by those nations as the symbol of their co-operation, continues to act on behalf of each of those nations (on the advice of the several Governments thereof) for the purpose of the appointment of diplomatic and consular representatives and the conclusion of international agreements, the King so recognized ' is permitted and authorized to act on our behalf for like purposes as and when advised by the Government.

" This External Relations Act is a simple statute repealable by the legislature and not a fundamental law. As a law it is, in fact, null and void to any extent whatever in which it conflicts with our only fundamental law, the Constitution. It is a simple enabling Act to permit of the carrying out of the external policy of the State in the field of international relations as indicated and provided for in Article 29 (4) of the Constitution and nothing more. This may be regarded as a unique arrangement. I am not disposed to question a statement of this sort. The situation which it was designed to fit, and for a number of years has effectively fitted, was likewise unique. The position, as I conceive it to be, is this: we are an independent republic, associated as a matter of our external policy with the States of the British Commonwealth. To mark this association, we avail ourselves of the procedure of the External Relations Act just quoted, by which the King recognized by the States of the British Commonwealth therein named acts for us, under advice, in certain specified matters in the field of our external relations.

" And now, to Deputy Dillon's second question—are we or are we not a member of the British Commonwealth? That is a question for which the material necessary for a conclusive answer is not fully available. It depends on what the essential element is in the constitution of the British Commonwealth.

" The British Commonwealth claims to be an elastic, growing, developing organism and the statesmen of the Commonwealth have, I think, adopted the view of Joseph de Maistre that ' In all political systems there are relationships which it is wiser to leave undefined.' I can only say that, without any request or reference or suggestion from us, on the day on which our Constitution came into force, viz. December 29, 1937, the following communication was issued from 10, Downing Street and published in the Press on the following day:—

> ' His Majesty's Government in the United Kingdom have considered the position created by the new Constitution which was approved by the Parliament of the Irish Free State in June, 1937, and came into force on December 29th.
>
> ' They are prepared to treat the new Constitution as not effecting a fundamental alteration in the position of the Irish Free State—in future to be described under the new Constitution as " Eire " or " Ireland "— as a member of the British Commonwealth of Nations.
>
> ' His Majesty's Government in the United Kingdom have ascertained that His Majesty's Government in Canada, the Commonwealth of Australia, New Zealand and the Union of South Africa are also prepared so to treat the new Constitution.' "

General Mulcahy: Perhaps the Taoiseach would finish the terms of the communication."

The Taoiseach: "As far as I know, that is the whole of it and I have made no intentional contraction. It is very important to have it correctly.

" The Government here did not feel called upon to make any comment. The provisions of our Constitution were publicly known for many weeks; our attitude towards the question of allegiance and related matters were known for years. We could only accept the British Government statement as the expression of a view taken by them in full knowledge of our position here at the time, and there has been, as everyone is aware, no constitutional or other change which would alter the situation since then.

" I fear, a Chinn Comhairle, that I have no further useful information that I can give Deputy Dillon. I must now leave him to answer his own question from the facts which I have presented.

" The communication issued from 10, Downing Street, which I have just quoted, contained the following paragraph also:—

> ' His Majesty's Government in the United Kingdom take note of Articles 2, 3 and 4 of the new Constitution. They cannot recognize that the adoption of the name " Eire " or " Ireland " or any other provisions of those articles involves any right to territory or jurisdiction over territory forming part of the United Kingdom of Great Britain and Northern Ireland or affects in any way the position of Northern Ireland as an integral part of the United Kingdom of Great Britain and Northern Ireland. They therefore regard the use of the name " Eire " or " Ireland " in this connection as relating only to that area which has hitherto been known as the Irish Free State.' "

Colonial Research.—Law falls within the sphere of the Colonial Social Science Research Council established by Mr. Oliver Stanley, then Secretary of State for the Colonies, and is represented on it by Professor Goodhart. In the first annual report it is observed that " in considering the general position of social science research in the Colonies, the Council has been conscious of several broad problems to be faced. The social sciences, unlike medicine and some other groups of subjects, do not form as yet a closely integrated set of disciplines. As far as the Colonial field is concerned, the progress of research in them has been sporadic and unequal, and in some of them, for example psychology and law, only the most tentative beginnings of research have been made." Nevertheless among the problems in which there is urgent need of research are enumerated: " comparative studies of local government, studies of land tenure in relation to agriculture and social structure, and studies of colonial administrative law, particularly in respect of procedure in native courts." One of the primary difficulties is to secure the research personnel for work in the Colonies. The question of a future when his specific project has been completed is an important factor. In some fields, for example anthropology or education, he may look forward to a period of continuity of work in the Colonies with the possibility of a return to a post at a university or in another institution connected with colonial matters. " In other fields, especially law," the report adds, " the openings leading out of Colonial research appear to be fewer, and a promising candidate for research may be unwilling to sacrifice a legal career in this country in return for Colonial experience which he may find it difficult to turn to advantage in his subsequent work. This is a very real problem. In some cases it may be possible to secure for research for a time men who are ordinarily engaged in administrative or other service in the Colonies. At present, how-

ever, the claims upon Colonial Officers are so great that there seems to be little possibility of enlarging the body of research personnel by these means."

The Enforcement of British Arbitration Awards in U.S.A.—Enforcement of arbitration awards has always been an important issue in international commercial arbitration. The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927,[7] which renders awards enforceable in a summary procedure in countries of the signatory powers, was adhered to by Great Britain[8] but not by the United States of America. Nevertheless, the execution of British arbitration awards and British judgments entered upon them have been favourably considered by American courts.

In the leading case *Gilbert* v. *Burnstine,* 255 N.Y. 348, 358 (1931), it was held that by agreeing to " arbitrate at London pursuant to the Arbitration Law of Great Britain," the New York party had submitted " to any rules or procedural machinery adopted by competent authority in aid of its (statute) provisions." This opinion has recently been followed by New York Supreme Court, Appellate Division, in *Sargant* v. *Monroe,* 44 N.Y.S. 2d. 456 (1944). There a contract provided for arbitration " in London, in the usual manner, according to the Rules of the General Produce Brokers' Association of London." The American party who refused to accept delivery of the merchandise (pepper) appointed, upon request, an arbitrator and a representative in London " for all purposes of the arbitration." A unanimous award of November 27, 1935, in favour of the English exporter, " in the form of a special case," was confirmed on July 22, 1936, by King's Bench Division, against which decision no appeal was taken.

To enforce the award in the same manner as a judgment, the New York party was personally served, and judgment on the award was rendered by the British Court in March, 1937. Action was instituted in New York to recover on the award of 1935 and on the 1937 British judgment for enforcement of the award. New York Supreme Court, App. Div., unanimously held that the New York defendant was not duly represented in the British court procedure for the enforcement of the award as a judgment. " Once the award became final," said the court, " the authority (of the representative of the defendant) ceased unless the defendant submitted to the jurisdiction of the English courts personally or through his duly authorized agent." Summary judgment, however, was given on the arbitrators' award of 1935 which was confirmed by the British court order of July 22, 1936, by which the award became final (as distinguished from the proceeding to enforce the award as a judgment). The App Div. pointed out that the N.Y. party cannot be heard to impeach the finding of the arbitrators, especially as the order of the British court of 1936, which was not appealed from, made the award valid and binding upon the defendant. Said the App. Div.: " The parties submitted to arbitration, selected their own arbitrators, impliedly agreed to abide by their decision, and participated in the arbitration which proceeded to a final award." As an appeal has not been taken to New York Court of Appeals, the decision is final so far as summary judgment on the award is concerned.[9]

This court decision again reaffirms the well-settled rule that the validity of a judgment upon an arbitration award rendered by a foreign court is determined by the statutes and rules of the place where the award was made or the judgment obtained. The same principle has been stated by U.S. Circuit Court of Appeals, Third Circuit, Pennsylvania, in *Moyer* v. *Van-Dye-Way Corp.,* 126 F. (2d.) 339, 341 (1942): " The general authority is to the effect that the validity of an arbitration award is determined by the law of the place of its rendition. 2 Beale, *The Conflict of Laws* (1935) s. 347.6."[10] To the same effect are further decisions of the New York Supreme Court in *Coudenhove-Kalergi* v. *Dieterle,*[11] enforcing a German award which was rendered by an arbitration court for the theatrical profession (Buehnenschiedsgericht), and of the Superior Court in Seattle, Washington, in *Tiefenbacher* v. *Dulien Steel Products, Inc.,*[12] where an award rendered in an ex parte arbitration proceeding before the Shanghai Metal Merchants' Association was enforced in 1941 against the American party. MARTIN DOMKE.

Comparative Law and Natural Law.—All problems connected with the function of Comparative Law recall the idea of Natural Law. Unfortunately this expression is the cause of great misunderstandings on the subject. When a Comparative lawyer mentions the elements contributing to the formation of Comparative Law, he does not intend to plunge into the abysses of the Natural Law theory of the Canonists, who consider it as

[7] See Nussbaum, *Treaties on Commercial Arbitration* (1942), 56 Harvard L.R. 219.
[8] The Arbitration (Foreign Awards) Act, 1930, 20 Geo. 5, Ch. 15 ; Russell, *Arbitration and Awards* (13th ed., 1935), p. 246.
[9] Cp. Lorenzen : *Commercial Arbitration—Enforcement of Foreign Awards* (1935), 45 Yale L.J. 39 ; Heilman : *The Enforcement of Foreign Awards in the United States* (1939), 3 Arbitration Journal 183.
[10] Cp. *Mulcahy* v. *Whitehill,* 48 F. Supp. 917 (1943), where U.S. District Court, Massachusetts, enforced, in favour of an Argentine firm, a New York judgment entered upon an award in an arbitration procedure in which the American party did not participate.
[11] 36 N.Y.S. 2d, 313 (1942).
[12] (1944) 2 *Arbitration Magazine* Nos. 1–2, p. 24.

the immutable result of the Golden Rule comprised in the Law and the Gospel.[13] In the comparative legal studies one must emphasize the great difference between the ancient school of Natural Law, with all its *ideal,* absolute principles, and the new conception of a *social,* progressive Law, the expression of the Truth, contained in concrete juridical formulas of the most different legislations, and considered as the backbone of all the laws of highly civilized countries.[14]

Comparing these different legislations, the jurist will find in all of them this common element of the modernly transformed Natural Law, which will not absorb but guide the national Law of each country towards a common aim of some general principles of Law for all civilized Humanity.

M. S.

NOTICES OF BOOKS

ADVOCACY

Mr. Aiyar has written an eminently practical book.[25] It consists of a series of lectures delivered to apprentices-at law under the auspices of the Bar Council of Madras by a leading member of the Bar, in which he imparts to his audience the fruits of his wide and varied experience. Though primarily addressed to Indian law students, who have their own special problems, his useful counsel is for the most part of general application and may well be taken to heart by practitioners of the law everywhere. Wisely, he refrains from discussing at length the well-worn theoretical arguments on the ethics of advocacy as a profession, for on this topic all that can profitably be said has long ago been said; he prefers to concentrate on the day-to-day questions of professional conduct which the advocate encounters in his practice. Not that he is lacking in inspiration, for he does not fail to exhort his readers to remember the lofty ideals of the profession of the law and the great traditions which it cherishes. These he enforces with felicitous quotations from famous masters, and indeed not the least of the attractive features of his method of exposition is the aptness of the passages which he has selected from the wide range of his reading to lend authority to his words. But it is with the daily work of the advocate rather than with its ultimate justification that the author is chiefly concerned, and here he is thoroughly at home.

In entering upon a profession in which so much is regulated by unwritten convention and so much is dependent upon the observance of a traditional code of honour the youthful aspirant stands specially in need of help and guidance. Experience can be acquired only by actual practice; it cannot be taught. But those who have acquired experience and have the gift of imparting its lessons can do much not only to smooth the path to success of the beginner but also to ensure the maintenance of the standards of conduct whose value they have learned.

The author takes the neophyte by the hand from the very outset of his career, tells him the nature and responsibilities of the profession on which he is embarking and the studies and training which are requisite to fit him for it, and then proceeds to deal with the manner in which he must learn to comport himself in all the manifold relations and contacts of the lawyer's life in chambers and in court. The Madras apprentices-at-law are fortunate in having had so sage a mentor, and their good fortune can now be shared by a wider audience. The legal profession is in these troublous times confronted with many difficulties in adjusting itself to a changing world, but it can never afford to sacrifice the principles inculcated in these lectures.

To a discreet Appendix Mr. Aiyar relegates his observations on the conduct of the Judge, and on this topic his comments, if brief, are marked by the same good sense which he invariably displays.

The Select Bibliography included in the volume is confined, with only one or two exceptions, to treatises which have appeared in the present century, but the problems with which the author deals are perennial. Some of his chapter headings are identical with those which the Frisian advocate Jacob Bouricius three centuries ago adopted in composing a manual for the instruction of his son on his call to the Bar. It is tempting to add to the list Lord Herschell's too little known address to the Glasgow Juridical Society in 1889 on "The Rights and Duties of an Advocate" and Lord President Clyde's address to the Edinburgh Juridical Society in 1922 on "The Profession of the Law." From the latter may fittingly be quoted, in concluding this brief review, the advice of a Dean of Faculty of former days—"In each case of difficulty choose for yourself the line which seems to accord best with the highest standards of honourable conduct you know, regardless of any other consideration, and you will never go wrong." With this counsel Mr. Aiyar would assuredly agree, for it is in the spirit which animates all his precepts.

M.

[13] *Jour. Comp. Leg.*, 3rd series, vol. xxii., p. 100; Pollock, "Hist. of the Law of Nature," *Jour. Comp. Leg.* No. 5 (1900), vol. 1, p. 418.

[14] Stammler, *Virtschaft und Recht*, 1896, p. 685, mentions Natural Law with a variable content; Geny, *Methodes d'interpretation*, 1899, p. 473, considers Natural Law a s a Law rejuvenated and transformed; Duguit, *L'Etat, le Droit* objective *et la Loi positive*, 1901, p. 72, says Natural Law a Law of solidarity; Saleilles, *Ecole historique et Droit naturel*, in *Rev. Trim. Droit civil*, 1902, p. 80, says Natural Law not an absolute Law, but essentially relative, and more recently Roscoe Pound, in *Acta* of the Int. Academy of Comp. Law, 1, 1928, p. 193, mentions the universally acknowledged Law of nature.

[25] *Professional Conduct and Advocacy.* By K. V. Krishnaswami Aiyar, Advocate, High Court, Madras. Second Edition. (Oxford University Press (Indian Branch), 1945.) Pp. xx+242. Price, Rs. 7-8.

HISTORY OF INDIA[1]

THE bringing up to date of the book here under notice, the first edition of which traced the history and general development of India up to the year 1936, has been the work of the survivor of its two original authors, Sir Atul Chatterjee, at present one of the statutory advisers of the Secretary of State for India. The fresh chapters now added, while primarily directed to giving a concise summary of the essential features of the new constitution brought (partially) into operation in the year 1937 and of the various political developments that have taken place since that date, are not in fact confined to that aspect of the subject but elaborate and continue the story of the evolution of Indian culture and the reaction of the people to the impact of the new world influences from the year 1919 onwards. It is, however, in the examination and analysis of the constitutional problem and of the reactions of the main political parties to the attempts on the part of the British Government to solve that problem that the readers of this *Journal* will be chiefly interested.

To comment in any detail on the mass of information imparted in this connection is, of course, quite impossible within the limits of this short review—nor indeed, it is conceived, would it in the circumstances serve any useful purpose, for it is to the actual situation to which all this has led up rather than to the various steps by which it has developed that importance and significance attach. It must be emphasized, at the same time, that it would be impossible to arrive at a correct appreciation of the present position without a careful study of the material events more particularly detailed by the author and of the surrounding political atmosphere of which he gives an enlightening description. The only feature that may perhaps appear a trifle disappointing is that the author, very properly no doubt having regard to his official position, but somewhat unfortunately from the point of view of his readers, has refrained from expressing opinions of his own. With his intimate knowledge of the conditions in India and his wide practical experience, any indication of his views and any suggestion for a possible solution of the very real difficulties that have to be surmounted, would have been both interesting and valuable.

It is difficult, of course, in the light of all that is brought to our notice, to exaggerate the seriousness of the unfortunate communal differences, and indeed Sir Atul makes no attempt to minimize the gravity of the position in this respect, pointing out the undeniable fact that these differences tend materially to increase as the two main communities begin to realize that full self-government cannot be very distant and that they must be more than ever vigilant to protect their respective interests. He emphasizes, however, that, in spite of the failure of what has come to be known as the "Cripps Mission," the declaration on which it was based still stands, and must be taken as representing the settled policy of the British Crown and Parliament. However that may be, and whatever temporary or provisional system of government may be devised, one thing stands out clearly, and that is that the ultimate responsibility for framing a new and final constitution for India must primarily rest on the Indians themselves. That this is no new conception will be obvious to the student of comparative legislation within the British Empire, and indeed a perusal of the preambles to the respective Constitution Acts of the various Dominions will show that the terms and conditions of federation have in each case been in conformity with the expressed desires of the Dominion concerned. K. K.

LAND TENURE IN THE COLONIES[2]

IN Western countries industrialization has provided the people with many sources of income. But in the British colonial territories land is for the most part the only form of capital, and its exploitation the only means of livelihood. Land is, therefore, regarded with almost a religious veneration, and rights in land are more highly prized than any other form of rights.

The vast majority of the sixty million people who inhabit the British colonial territories still practise subsistence agriculture. They grow all that they require. In this way they avoid the ups and downs of world prices, but their standard of living is low. If it is to be raised, as raised it must be, then cash crops must be grown for export and subsistence economies be replaced by those of money. This has already happened in many areas and the rate of change has been enormously increased as a result of war conditions. The indigenous systems of land tenure are being rapidly transformed, land is being commercialized, agricultural debt is beginning to rear its head, and the growth of economic individualism is making rents in the social fabric with which the land systems are inextricably interwoven.

Colonial governments have become aware that a policy of *laisser-faire* with regard to land can no longer be pursued. Lord Hailey has done much to draw attention to the urgent need for direction so that the mistakes made in the earlier days of British administration in India may not be repeated in the younger dependencies. There is a

[1] *A Short History of India.* By H. Moreland and A. C. Chatterjee. (Longmans Green & Co., Ltd., London.) Price 21/-. Pp. viii, 548.

[2] *Land Tenure in the Colonies.* By V. Liversage. (Cambridge University Press.) Pp. 151, 7/6.

general need for more knowledge of the indigenous systems of tenure and of the changes that are taking place, and there is a need also for much co-ordination of policy and for the exchange of information between the various colonial governments.

Text-books on land tenure in the Colonies are therefore to be welcomed and Mr. Liversage is to be congratulated for being the first in the field. He is an agricultural economist in Kenya where there is neither a lack of interest in problems of land nor of variety in the systems of land-holding. Mr. Liversage has the merit of being short and to the point. The first chapter of his book, for example, consists of half a page. Yet it sets out a most useful arrangement of land tenure systems into (a) Customary (tribal and feudal) and (b) Contractual (labour tenancy, share tenancy, cash tenancy, emphyteusis and owner-occupation). The succeeding chapters deal with these various forms of land-holding. Chapter IX discusses the passing of tribal tenure with all its agricultural drawbacks (notably overstocking). Chapters XI-XV are devoted to the dangers of the free-hold system, excessive sub-division and fragmentation of holdings, indebtedness and the various weaknesses of owner-occupation. But the most interesting and instructive chapters are the last three. In these Mr. Liversage reviews the remedies for debt and loss of land (e.g., prevention of mortgage, and provision of state and co-operative credit) and the trend of modern policy (with its recognition of the distinction between ownership and security of tenure, limited freeholds, usufructuary occupation coupled with state control, local land boards in tribal areas and the various forms of so-called "vertical co-operation").

Mr. Liversage is a strong advocate of the policy of Colonial governments buying out, where this is still possible, existing claims over land, and thus converting landowners into secure tenants subject to official control of land use. The advantages to be obtained in this way would go a long way beyond those offered by the mere restriction of alienation and hypothecation. The size of holdings and their lay-out could be controlled in accordance with modern needs and the way would be open to governments to introduce capital for land improvement and equipment, recouping themselves by increase of rent in strict accordance with the economic value of the improvements effected, without burdening the occupier with overhead charges in the form of loans. Excessive subdivision and fragmentation would be prevented, and yet sufficient elasticity could be retained, to allow of development, with the changing social needs of the people. In some regions an alternative method would be the delegation of greater measures of land control to the local Native Authorities. On the other hand, Mr. Liversage is aware of the dangers of too much government interference and quotes the observation of Lord Bledisloe that "centralized direction by a well-informed Ministry of Agriculture is one thing, centralized control is quite another."

Land Tenure in the Colonies will be a most useful handbook, not merely for Colonial Agricultural and Administrative officials but also for all those who are interested in the development of the Colonies and the welfare of its peoples. C. K. Meek.

AXIS RULE IN OCCUPIED EUROPE.[3]

This work by a Polish lawyer of note is of value to all, and particularly lawyers, interested in policy in regard to the control of Germany. The first and most interesting part of the book analyses with impartiality and detachment the purposes and legal technique of German and Italian occupation of Europe. As a general essay on the subject it could scarcely be bettered. It demonstrates how the principal German objectives, the subjugation, spoliation and frequently racial extinction of conquered peoples, were systematically carried out by administrative and legislative measures varied to meet local conditions. The account of the functions of the German Police is illuminating; showing they not only organized and maintained political life in the occupied territories, but assisted in German colonization and the consequent mass deportations of native populations.

Related to this is the chapter on "Genocide." Though it is, perhaps, questionable whether "Genocide" is as new a conception in the destruction of nations as the author says, it has certainly never had as repulsive a motive as the theory of Germanic racial supremacy. Into the framework it is easy to fit such institutions as the murder camps now being uncovered, whose existence would otherwise seem incredible.

The second part of the book deals in outline with the constitutional expedients adopted by the Germans and Italians to enforce their policy in the occupied countries. It attempts to cover too wide a field; general principles and the effect of the measures on human existence tend to be obscured by the amount of detailed information which has been included in a comparatively small compass.

The third and largest part of the work consists of well-selected extracts from the relevant laws and decrees of all types issued for the government of Axis-occupied Europe. They are of interest, not only as precedents but in bringing to notice the great number of matters for which an occupying power must make provision. In reading this legislation

[3] *Axis Rule in Occupied Europe.* By Raphael Lemkin. Carnegie Endowment for International Peace.

it is of particular importance to relate it to the fundamental purposes of German policy. In itself a measure may appear unobjectionable; all depends on its real intention and the spirit in which it is carried out. The Decree with regard to Eastern workers (p. 556) does not itself suggest that thousands of Russians were to be starved to death in the German munition factories. Similarly the Germans, themselves, may now be disposed to question the educative value of forced labour (p. 544).

Indeed the work as a whole must impress the reader with the need to have regard to fundamentals rather than to purely legal principles; a distinction which the author does not always observe. It seems somewhat sterile to indict the Germans for a breach of International Law in altering the domestic Law of an occupied country, usurping sovereignty, and sequestrating the assets of privately owned National Banks. International Law grows and develops in accordance with the sentiments of the age. H. B.

INDIAN PRISON REFORM

It is now 22 years since the Indian Jails Committee of 1919-1920 made its report, and the Department of Criminal Science of Cambridge University has published a short book entitled *The Modern Prison System of India* by Lt.-Col. Barker, I.M.S.,[4] who had a wide experience of Indian jails, setting out mainly the steps that have been taken to reform the jails in the light of the Committee's recommendations. Two useful appendices by Sir Louis Stuart, of the United Provinces, and Mr. Campbell, of the Punjab, throw light on the characteristics of the Indian criminal who is far more often violent than dishonest.

The direct results of the Committee's report are perhaps not impressive, for apart from the partial closure of the Andamans as a Penal settlement—there were still 6,500 prisoners there when the Islands were taken by the Japanese—most of the reforms actually made are the logical outcome of the policy of the years immediately preceding the war of 1914-18. One reason for this is that the Committee went somewhat beyond the terms of their reference in proposing changes in the Indian Penal Code and in the Code of Criminal Procedure, another is that the expense involved in their suggestions was beyond the scope of the Provincial budgets. Moreover, in the succeeding years India has been swept by waves of political agitation. All of these, Khilafat, non co-operation and Congress and the like have flooded the jails with political prisoners, many of them highly educated persons of both sexes, whose mentality has presented new psychological problems, and whose numbers have paralysed all measures of reform by sheer overcrowding. Col. Barker deals with the more recent stages of these movements, but as far back as 1922 the District jail at Benares was given over entirely to non co-operators, who submitted to no discipline, did no work, and reduced the jail to the status of a non co-operation club. At about the same time the central jails of the United Provinces had to accommodate in barracks upwards of 200 men who were sentenced to death for an atrocious murder of police, until their appeal could be heard in the High Court.

When the Committee began their enquiries the jails had been seriously affected by the War, but the system was on the whole efficient and suitable for a jail population dissimilar in many ways from those of Western Europe. Under the Medical Superintendents the jails were airy, clean and well disciplined; the prisoners were well fed and housed, and their work, weaving of cloth and matting, rope-making, cultivation and the simpler handicrafts were suitable for a population predominantly agricultural. Good behaviour earned promotion as convict warders and overseers as well as substantial remissions of sentence. Religious and caste prejudices received reasonable but not excessive consideration. Punishments were already less frequent and less severe, and reformatories and juvenile jails as well as separate establishments for women had long been in existence.

The Committee asked for larger jails, more whole-time superintendents mostly non-medical, more paid subordinates and a reduction in the number of promoted prisoners, cells, machinery and education. Movements have been made in all these directions, but with a wise caution and a necessary regard for finance. Some new jails have been built and there has been an increase in staff, but on the whole the old jails were not unsatisfactory, doctors are still the best superintendents, the system of rewarding convicts by promotion is good and cheap, cells in an Indian hot weather are a cruel punishment and there are other means of preventing unnatural vice. The use of high-power machinery raises the perennial problem of competition between jail factories and those outside, and it is open to question whether it offers any advantageous training to the Indian prisoner. Education and with it physical drill and even games have been tried with some success, and much may be done on these lines to save the younger prisoners from jail corruption, but with older men reformatory measures present great difficulties.

The first need is a proper system of classification, but beyond the division into habitual and casual adopted many years ago, there has been little possibility of devising a more elaborate method of segregation of contaminating influences. This is especially desirable in the under-trial barracks where the most harm is done. Overcrowding is no doubt largely responsible for this failure, but unfortunately attention has in recent years been fixed on an unscientific division into political and non-political which leads nowhere.

[4] *Modern Prison System of India.* By Lieut-Colonel F. A. Barker. (Macmillan & Co., Ltd.) Pp. xvi, 139. 10/6.

The criminal tribes offer a problem of their own. In Northern India they vary greatly from Sansis who provide many of the most dangerous dakoits to mere sneak thieves like the Haburas. The Indian law treats them all with great severity, and prescribes long terms of imprisonment for any who are convicted more than once. Inside the jail little can be done for them, but outside much good work has been done both by the Criminal Tribes settlements, and those most successful of all missionaries the Salvation Army. Since the Committee's report some local societies have been formed in different Provinces for the aftercare of prisoners, but apparently with small success. Without an enlightened public opinion little can be done. In the villages ex-convicts who have been sentenced for murder or manslaughter are usually readmitted to their place without trouble, but dakoits and burglars are rejected by their communities and marked down by the police. It is difficult to find anyone to help them to go straight, and even if they try to do so they are the natural victims of false accusation when another crime is committed. In towns and among educated people a better spirit is sometimes shown, and in one case in my own experience an old thief luckily acquitted by the jury was employed with complete success as a watchman by the gentleman whose house he had tried to rob. As Colonel Barker says in his conclusion, " There is still much to be done, and it is now for Indians themselves to put their house in order." A. G. P. PULLAN.

INTERNATIONAL TRIBUNALS.

THIS little book[5] by the author of *The Permanent Court of International Justice* and editor of four volumes of *World Court Reports* made a very timely appearance towards the end of 1944. It is divided into four parts, the first being introductory and consisting of a short sketch of the evolution of international tribunals during the hundred and fifty years, since the British-American Treaty of 1794. Part II deals with the general problems common to almost all international tribunals and with the different solutions found for these in the past. In Part III, which sets forth the various specific problems of the future, the author expresses the opinion that the continuance of the Permanent Court of International Justice is essential and that the Permanent Court of Arbitration should also be retained. Part IV consists of two chapters which recapitulate the author's conclusions for the future. Of these, the chapter on the " Functions Served by International Tribunals " is particularly interesting.

The book must have been of considerable service to the jurists who were engaged in framing proposals for the San Francisco Conference. The necessity for continuing The Permanent Court of International Justice and the Permanent Court of Arbitration appears to be recognized. Judge Hudson points out the loss of the experience of the past which would result if the existing institutions were not preserved and adapted for the present and future needs. In emphasising that the former Permanent Court of International Justice had no general mandate from the whole community of States and could not proceed independently, he suggests that a Court, or a series of courts, might be maintained by the international community with power to adjudicate certain types of disputes regardless of the consent of all parties, and endowed with such continuing general support that its authority would not be lightly called in question. This suggestion seemed to be embodied in the proposals before the San Francisco Conference to have Regional Courts in places where international disputes have arisen to deliver decisions on the spot, which, however, would be subject to review by the Central Permanent Court, and the further proposal to compel the disputants to go before the court. The author contends that the function of enforcing a decision of an international tribunal is an executive function, and as such becomes a political as distinguished from a judicial matter. The Statute of the former Permanent Court of International Justice conferred no power on the court to deal with the enforcement of its judgments. Judge Hudson comments that in its jurisprudence the Court has persisted in refusing to consider any question of enforcement. He also observes that it is a striking fact that States have seldom refused to carry out, or abide by, the decisions of international tribunals, but the question of enforcing the Court's decisions seems to be one of the chief amendments considered at the San Francisco Conference. Whether it is proposed that this should be done by the Court itself or by the Security Council does not (at the time of writing this review) seem to have been made clear.

This book is very clearly and concisely written, and the author is particularly well qualified to deal with the subject, having been a member of the Permanent Court of Arbitration since 1933, a member of the Danish-Greek Permanent Conciliation Commission since 1935, and a judge of the Permanent Court of International Justice since 1936. There is as an appendix a selected general bibliography and very extensive bibliographical notes, followed by an index. The work very ably fulfils the author's object of "appraising the tribunals which have recently existed in the world, and assessing the rôle which tribunals may be expected to play when law and order are re-established." J. C. G.

[5] *International Tribunals—Past and Future.* By Manley O. Hudson. (Washington: Carnegie Endowment for International Peace and Brookings Institution, 1944). Pp. xii, 287. $2.50.

FRENCH AND GERMAN LABOUR LEGISLATION BETWEEN THE TWO WORLD WARS[6]

THIS small volume represents the third published contribution of the Institute of Comparative Law of the Ecole Libre des Hautes Etudes founded as a Free French University by French scholars in exile. The book sets out to deal with developments in Labour Law in Germany between 1918 and 1933 and in France between 1918 and 1940, i.e., the periods of free development in both countries. The main theme of the book is set against an adequate historical background, and the argument throughout is greatly enhanced by the author's political and sociological insight into conditions in both countries, of which he obviously has first-hand knowledge.

The author applies a comparative method in dealing with this problem and deals with the various factors in the problem side by side. It is always a hard matter to decide, in adopting the comparative method whether to deal with a question of this type first of all entirely in respect of one country and then of the other, or to deal with the various factors piecemeal. The general impression is that this book would have been more readable and the argument more sustained if each system had been dealt with separately and a third part added to the book consisting of a concluding comparative appreciation. One is left with the impression, which is probably true in fact, that the author's knowledge of German conditions is far deeper and more practical than his knowledge of conditions in France, and this tends to make the comparative method which he adopts slightly one-sided.

In both France and Germany the "Fundamental idea of both systems was the construction of a new social system within the framework of the existing economic structure" (p. 14), though the French reform in this period of liberty came 18 years later than the German. The author characterizes these reforms as a movement from an individual to a collective status of labour. To some extent a similar process has taken place in England.[7] The author has emphasized as the important factors in this labour movement:

(1) The innovation of collective bargaining to achieve an economic equality of contracting with the corollary that such collective agreements have priority over individual labour contracts. In this connection the important point is made that in both France and Germany legislation recognizing collective bargaining was preceded by the agreement of employers and workers themselves adopting collective bargaining as a necessary factor in industrial organization.

(2) The second important innovation of these reforms was that of mediation and arbitration. The author's treatment of these factors, which had very different results in France and Germany, is excellent. The third principle of the reforms was the establishment of Workers Councils with the objects of dealing with complaints and general social welfare of workers and of maintaining production.

The author's chapter on collective bargaining is well done. Starting in Germany from the Gewerbeordnung of 1869 he traces the development of the right of association through all its periods of progress and reaction until the time when under the Weimar Republic, ". . . collective bargaining had become the dominating method of determining working conditions throughout Germany." (p. 56.)

In contrast to the progress in Germany, the movement towards collective bargaining in France was less marked due to the weakness of Trade Unions, the hostility of the employers and the attitude of the Government.

This relative lack of progress is remarkable in view of the stronger political consciousness of France and the Political importance of the workshops since 1848. It may be explained in contrast to the German situation by the fact that there was less economic necessity for co-operation of employers and workers in the years following 1918 than in defeated Germany. The theories of Duguit in so far as the mass of workers were aware of their existence, one might have expected to have assisted collective bargaining, but apparently led instead to industrial syndicalism.

With more revolutionary aims than in Germany, French Trade Unionism achieved less.

The strenuous efforts made in Germany between the two wars starting with the helpful democratic precedents of the Soldiers and Workers Councils which sprang up immediately after the armistice in 1918, and the continuation of such efforts under the Weimar Constitution to the exclusion of other important problems such as that of control of the great land owners and big industrialists, hold out promise for the future, and leave the reader of this study with a stronger impression of optimism for the future of German Labour than a purely short view would justify. In this respect Dr. Lorch's book is particularly opportune and valuable.

The book is generally well written though it contains some mistakes of punctuation. To an English reader the use of the word "domiciliary" as applied to the rights of the

[6] Lorch, *Trends in European Social Legislation between the Two World Wars.* Editions de la Maison Francaise, 1943.
[7] R. H. Graveson, *The Movement from Status to Contract.* 4 Mod. Law Rev. 267.

employer in respect of prohibiting the entry of other persons upon his premises, is inappropriate (p. 123). The fact that the contents appear at the end of the book instead of at the beginning impress it with the stamp of French workmanship.

R. H. G.

LABOUR COURTS[8]

This pamphlet, one of a series somewhat resembling the Oxford Pamphlets, has all the advantages and limitations of brevity. To compress within some 30 pages a comparative study of the labour jurisdiction established in various countries is an achievement made possible only by M. Binet's capacity for sketching the broad outline and illuminating his argument by touches of detail, here and there.

After treating generally the history and general advantages of labour courts over ordinary courts for their special functions, the author's argument concludes with a discussion on whether Canada would ratify any international convention which may be drafted on the general establishment of such courts. The pamphlet can give no more than a superficial survey of the problem, and its appeal is chiefly of local interest.

R. H. G.

COMPENSATION FOR DISMISSAL[9]

This is a Hebrew law-book by two advocates of Palestine who are teachers in a High-school for law and economics in Tel-Aviv. It deals with a subject of Labour Law which has been notably developed by the Jewish Arbitration Courts in Palestine as well as by the Government Courts since the British occupation: the compensation due to an employee when he is dismissed with or without notice. In the early days of British administration the Jews of Palestine, who under Turkish rule, had been accustomed to settle their disputes in civil affairs through their own voluntary non-official tribunals, maintained that practice for many of their internal questions; and their tribunals were recognized as regular arbitration courts, whose awards could be executed by the civil authorities. It was in these tribunals that the custom of awarding to the dismissed employee compensation according to the length of service was established by a series of decisions given in 1920-1921. The custom sanctioned by the arbitration courts acquired the force of law in Palestine; and when awards were challenged before the Government Courts, they were upheld. As in many other aspects of the social life of the Jewish population in Palestine, their progressive custom or usage has become binding on the community, first by the force of public opinion, and then by the law of the land. It is interesting that the compensation for dismissal is recognized in the large international corporations, such as Shell and the Irak Petroleum Company which operate in Palestine.

The authors in their introduction write enthusiastically about this innovation in the law of employer and workman which was due to a fresh application of the principles of social justice inherent in the Mosaic law. They note that about the same time, namely, in 1921, the legislature of several European countries, Germany, Austria and Czechoslovakia enacted similar provisions in favour of the dismissed employee. But there was no direct connection between the judicial "common law" of Palestine and these legislative enactments. The Jewish system of granting a month's salary for each year of employment was original.

The subject is examined with great fullness and with equal lucidity; and the judgment of the Jewish tribunal and of the Palestine law courts are set out in full. Moreover, the subject receives comparative treatment in relation to the English law and English cases. It would be a service to legal study if the authors would produce an English version of their work, possibly in abridged form.

N. Bentwich.

CANADIAN GOVERNMENT AND POLITICS.[24]

The government of the British Empire has been widely studied in this country, the government of the Dominions little, if at all. The learned treatises of the late Professor Berriedale Keith and others on imperial constitutional law have not unnaturally devoted their main attention to the more formal aspects of the constitutions of the Dominions. No doubt most well-informed people are aware of the differing degrees in which the federal principle is admitted into the government of the several Dominions and of the general acceptance by them of British principles of parliamentary government, but it may safely be said that the differences in the actual working of the Cabinet system, in the nature of the political parties, or in the organization of the civil service are little understood. The reason is plain: the books do not exist. Yet the United Kingdom and the Dominions have surely something to learn from each other's experience, and in any case the comparative working in different environments of institutions which have common origins is a stimulating subject of study. The appearance of Professor Clokie's

[8] Henri Binet. *La Juridiction du Travail.* Pp. 31. 15 cents. L'Ecole des Sciences Sociales, Quebec.

[9] *A Chapter in the development of Labour Law in the Jewish settlement of Palestine.* By M. Wager and P. Dickstein Pp. 192. Reuben Mass. Tel Aviv.

[24] *Canadian Government and Politics.* By H. McD. Clokie. (Longmans, 1944.) viii+351 pp. 18/-.

book, dealing in reasonable compass with the actual working of Canadian institutions, should therefore be warmly welcomed.

The book is primarily a textbook for Canadian universities, but Professor Clokie knows that textbooks are none the worse for being readable. His approach, as befits a Professor of Political Science, is cool, objective, in short scientific: he is more concerned to understand than either to defend or to attack. But though description and analysis predominate, he is not afraid to express a considered opinion on controverted constitutional points, on problems of institutional development, and occasionally, by implication, on personalities.

Professor Clokie begins by discussing whether Canada is a State and concludes of course that it is, though "the Canadian status of sovereignty or independence is more a matter of practice than of law." His conclusion on the parallel question whether there is a Canadian nation is less unqualified: "its continued existence has been largely experimental and its future depends chiefly on the capacity of the people to tolerate marked dissimilarities and yet cultivate mutual interests and loyalties." After a brief summary of Canada's constitutional evolution, Professor Clokie passes to the main subject of the book, the description of Canadian government to-day, or rather of Canadian government as it was in 1939, with some consideration of those wartime developments which seem to be of permanent significance. In his description of the Canadian constitutional system generally he discriminates with care between British influences in relation to the conventions of Parliamentary government and American influences on the federal side of the constitution; but he finds that certain developments, for instance in the party system, are particularly Canadian. The discussion of administration is somewhat jejune compared with that in Mr. Leicester Webb's short book on *Government in New Zealand*, but there are fuller accounts to which Professor Clokie does not fail to refer his readers. Specially interesting, perhaps, is the brief account of the wartime use of boards and commissions—to some extent on the American model despite the different systems of government—and of the increasing importance of certain Ministers, particularly those of Finance and Munitions, in the administrative structure.

Professor Clokie moves on to new ground in his discussion of provincial and local government. As serious students will be aware, the Canadian provinces are an exception to the usual generalization that the development of federal constitutions tends to strengthen the federal power. "Their historic rights of federal self-government have been fortified by the influence of the American doctrine of a legally complete division of powers. . . . Their essential independence within a wide sphere of government is acknowledged, their special interests have been preserved from infringement, and their claims have been constantly effective through political practice, governmental conference and legal decision." One could indeed wish for a fuller discussion of provincial government in practice. The account of local government contains in brief space much interesting matter.

The book ends with a chapter on the future, much of it devoted to the delicate question of constitutional amendment, on which Professor Clokie has one or two specific suggestions to make, notably that the most appropriate body to revise the constitution would be an advisory conference of some 60 members "representative equally of the Dominion House of Commons in proportion to its partisan composition, of the provincial legislatures . . . and of elected members."

The impatient reformers of the day may be irritated by Professor Clokie's assumption that the Canadian constitutional system will not undergo any revolutionary change, though they would do well to note his warning that "nothing is more destructive of democratic constitutionalism than over-emphasis on ends to the neglect of means." Coming events may increase the distinctiveness of Canadian institutions. But whatever the course of events may be Professor Clokie has laid a solid foundation for the understanding of their development. Despite a few minor errors the scholarship of his book is essentially sound and it well deserves the attention of the student of comparative government.

W. P. Morrell.

LEGAL THEORY[10]

In this book Dr. Friedmann has made a valuable and welcome contribution to English legal writing. He has trodden ground which few Englishmen since Maitland have either cared or dared to tread; and in so doing he has materially helped to fill a gap of which an increasing number of lawyers in England and the United States are becoming conscious. He sets himself an ambitious threefold purpose: to reduce every legal theory to its essential foundations; "to demonstrate the vital significance of legal ideology for the actual working of the law"; and to help to dispel the myth of the futility for pragmatic Common Lawyers of metaphysical Continental legal philosophy. The measure of his success in achieving his first two objectives is apparent from a reading of this book. Only the attrition of time upon English legal conservatism will

[10] *Legal Theory.* By W. Friedmann. (Stevens and Sons, Ltd.) Pp. xvi, 448. 30/-.

reveal the effectiveness of his efforts to attain his third objective. Certainly not the least achievement of this work consists in demonstrating very effectively the proposition, too seldom realized, that "all systematic thinking about legal theory is linked at one end with philosophy, and, at the other end, with political theory." One is led to suspect in this proposition the undeclared thesis of "Legal Theory." But perhaps Dr. Friedmann hesitated to tell many Common Lawyers directly, not only that they did not know of the integration of political philosophy and legal theory, but that they did not even know that they did not know it. Such is the heritage of analytical jurisprudence.

Apart from Hall's *Readings in Jurisprudence*, Berolzheimer's *World's Legal Philosophies* and the collection of essays known as *Modern Theories of Law*, the author had nothing approaching a precedent in English for attempting a work of this kind. He has been all the more successful in his arrangement of the subject matter. Starting with an outline of the main issues in legal theory, Friedmann deals first with Natural Law from Greek philosophy to its points of contact with modern sociological theories. In parts 3 and 4 of his book continental jurists of the 19th and 20th centuries are considered, and throughout them all one can detect the political theme leading, in the case of Hegel and Gény, towards the National State, and in the case of Jhering, Menger and Radbruch, towards socialist democracy. The author's chapters on Natural Law are very well done, and his broad conceptions of the impact of various legal theories on legal thought have been set down in a most convincing manner. Part 6 dealing with legal theory, social ideals and legal practice, and part 7 on legal theory and some problems of our time, complete the book.

Legal Theory is written in two completely different styles. The first part of the book and the last few chapters have obviously been written *as a book*: the author has dealt in some detail with various legal philosophies, and while he himself admits that the reading of this part may be heavy going for one not familiar with these philosophies, it does represent a valuable and almost unique record in English of the main outlines of the theories considered. Part 6 of the book, on the other hand, is much more discursive and very much more readable, consisting as it does to a large extent of reprints of Law Review articles. The style of writing is good and at times reaches a very high level: Chapter 3, for example, starts with the following paragraph:—

> "The history of natural law is a tale of the search of mankind for absolute justice and of its failure. Again and again, in the course of the last 2,500 years, the idea of natural law has appeared, in some form or other, as an expression of the search for an ideal higher than positive law after having been rejected and derided in the interval. The problem is as acute and as unsolved as ever. With changing social and political conditions the notions on natural law have changed. The only thing that has remained constant is the appeal to something higher than the positive law. The object of that appeal has been as often the justification of existing authority as a revolt against it."

This is good writing. On the other hand, he occasionally becomes rather obscure, as, for example, in the following passage:—

> "It is not far, from this conception, to the National Socialist conception of labour embodied in the law of 1934, which deprives the employees of personal allegiance on to the service to an entity. The leader and to national service, and makes the employer or director the sole leader, as the embodiment of the same institution."

In a first edition of a book of this kind there are, naturally, a number of typographical errors which it is not proposed to catalogue in this review.

In dealing with Natural Law the author remarks on Pufendorf's anticipation of Kant's categorical imperative: "Let no man bear himself towards a second person so that the latter can properly complain that his equality of right has been violated in his case." It is suggested that this apparent coincidence becomes less remarkable if one takes the view that many principles of this kind which have appeared in legal theories over the past two centuries have a common source in the Christian doctrine of doing unto others as you would that they should do unto you (p. 33). In dealing with the growth of natural law theories in England and America the author gives too little emphasis to the important part played by equity and canon law in both countries, and by pioneer conditions in America. The influence of canon law is far from being a thing of the past in the United States, as witness the papers in legal philosophy published by the American Catholic Philosophical Association, a society which represents a stronghold of neo-scholasticism.[11] The second point which one might make on the author's treatment of Natural Law is the need for a very careful discrimination between Natural Law as a theory and the common sense of Common Law as a matter of fact in the growth of English Law. Thus his contention (p. 52) that the judicial interpretation of the standard of reasonableness is influenced by conscious or unconscious ideas of Natural Law cannot be accepted without question. "Reasonableness"

[11] See *Proceedings of the American Catholic Philosophical Association* (19th Annual Meeting, December 30, 1943).

in the Common Law is not entirely without foundation in the individualism of the common man.

In reading the author's account of continental theories of law two points strike one: the first is the futility in a book of this kind of mentioning obscure and little-known continental philosophers without giving any indication, in a footnote or elsewhere, as to who they are; and the second is the general impression that the unconscious philosophical method frequently followed is to base a philosophy on a given legal system, usually of empirical growth, and not *vice versa*. This reduces the function of legal philosophy in general to influencing the development, but not the creation, of a legal system: and that, in fact, has been generally the extent of the influence of legal philosophy.

The author shows great interest and keen insight into the law of trade disputes which are well treated in the latter part of the book. This topic is becoming of increasing importance. The neutral attitude of English courts in these matters, particularly in face of the growth of large groups of employers and workers, will have to be abandoned as the groups become larger and fewer, with political power to make their wishes effective. Private trade war will have to give place to a minimum degree, at least, of State control, and it will then be for the judges to decide disputes in accordance with such policy of control as may be embodied in legislation. At the point at which delegated or decentralized legislative and disciplinary authority, as it exists in trade and professional associations, threatens to become independent and collateral, legislative interference will become necessary (as it did after the General Strike of 1926), and the judge will abandon his self-imposed function of referee and become a judicial channel for the enforcement of legislative policy, both for maintaining the supremacy of the Common Law and in the protection of the interests of the public at large. The reaffirmation of the principles of free access to the courts and the general jurisdiction of the Common Law judge over all men seeking a remedy in his Court becomes increasingly a matter of political and constitutional importance.

Dr. Friedmann demonstrates in this book the value of the comparative method of jurisprudence for which his expert knowledge of English and German Law fits him so well. While Chapter 24 on English, American and Continental Jurisprudence is excellent, the author's appreciation of Pound's Sociological Jurisprudence is not so strong; and it is considered that he underestimates the importance of this great American scholar in the legal thinking of this century. It is not easy, solely from Pound's writings, to appreciate the full implications of his philosophy.

The carefully selected bibliography at the end of each chapter will be found extremely useful to any who wish to pursue further a particular line of thought. *Legal Theory* is a book of real value to academic lawyers and students of this vast subject, and its more discursive parts should be of considerable interest to every practising lawyer.

R. H. Graveson.

THE CATHOLIC VIEW OF LEGAL EDUCATION[12]

An appendix to the discussion on Legal Education in the U.S.A.[13] is provided by an article by Professor Francis J. Rooney of the Loyola University School of Law. Professor Rooney views with alarm certain aspects of the Report of the Committee on Curriculum of the Association of American Law Schools. That Report recommended a broad grounding in philosophy and logic as a basis for dealing with general problems of law, and suggested John Dewey's *Logic* as appropriate material for such training. This proposal Professor Rooney considers to be in fundamental conflict with the basic philosophy of Catholic law schools in America. It is a practical conflict between Logic and Realism on the one hand and Neo-Scholasticism and the Eternal, Divine Plan of the Universe on the other. The article accordingly calls for a re-vitalization of scholastic principles in the face of growing danger of the domination by realism and materialism of the American law schools of the future.

A second article in this paper, on "Some Implications of the new Code of Canon Law for Legal Philosophy," discredits the Common Law as having too narrow a basis in precedent to cope with the numerous novel situations of war-time. Set against this empirical body of law is the Code of Canon Law of 1917, which " . . . recognizes God as source, sanction and end of law," and sets up in place of precedent its own underlying principles and norms of eternal validity. It is the voice of St. Thomas Aquinas.

R. H. Graveson.

ELEMENTS OF ROMAN LAW[14]

The purpose of this book is set out in the statement that "it seems lamentable that anyone should be credited with a knowledge of Roman Law who has not read Justinian's Institutes." Accordingly, the treatment adopted is to use an English translation of the

[12] *Papers in Legal Philosophy*, reprinted from *Proceedings of the American Catholic Philosophical Association* (19th Annual Meeting, Chicago, December 30, 1943).

[13] See *Jour. Comp. Leg.* (1944). Vol. xxv. p. 54.

[14] *Elements of Roman Law*. By R. W. Lee, D.C.L., F.B.A. (London : Sweet & Maxwell, Limited. 27/6.

Institutes, re-arrange the titles where necessary to suit the scheme of the book and link them together by a commentary. This interweaving of commentary and text enables a student to read straight on without having to pause to consult footnotes. There is a concise historical introduction, and, at suitable places, sections showing the influence of the Roman Law just discussed on Modern systems. The result is a most useful book and one which will be welcomed by teachers of Roman Law. Each branch of the Law is dealt with in sufficient detail and the references to modern law are particularly helpful. The vitality and permanent value of the Roman Law are in this way brought to the notice of the student. It is the author's modest hope, that those who read his book may retain in their memories something worth having. That should certainly come to pass.

M. G. F.

HINDU LAW IN MYSORE[15]

Mr. Srinivasan's *Hindu Law in Mysore* will, of course, be primarily useful to a legal practitioner in the State of Mysore, but the law laid down in the Privy Council and the High Courts of British India is also sufficiently dealt with so that the book will be of interest to students outside Mysore and to prospective legislators. The author has used as a framework for his treatise a Mysore Statute of 1933 mainly concerned with the rights of women. He has been painstaking in marshalling his authorities and indicating the special contributions of the Mysore High Court and Legislature to the development of Hindu Law. Important points are hammered well home so that the dullest cannot fail to understand. Mr. Srinivasan is to be congratulated and the Bangalore Press is also entitled to credit for good work in spite of war-time difficulties.

H. S. Chatfield.

BOUNDARY MAKING.[16]

This book, by the Associate Professor of Geography in the University of Hawaii, is described as "a first aid handbook for all who have responsibilities in making or maintaining boundaries." Its appearance is certainly opportune. For although boundaries may no longer have their old function in defining strategic frontiers, they will still remain permanently important for fiscal and social and administrative purposes. And the end of the second world war sets going again on a vast scale the tedious business of boundary making. Mr. Boggs points out in his foreword that there are to-day more than 100,000 miles of international boundaries in five continents; and tens of thousands of miles have disappeared from the map.

The book has three main parts, of which the first deals with the general situation, and is attractive not only to the technician but to the general reader. It is concerned with the different classifications of boundaries, and the functions and friction of boundary. It is concerned also with the human and physical factors of boundary making. Professor Jones is at once a most learned and informed specialist and a lucid writer. He has commanded the literature about boundary commissions in three languages; and has extracted a remarkable amount of interesting information. He sums up his knowledge by the conclusion that there are no intrinsically good or bad boundaries. "Given no check on national sovereignty, all international borderlands are perpetually critical." He shows that so-called scientific boundaries are actually the same as strategic. And both terms may have lost all meaning in view of the new developments of air power.

The second and third parts of the book, which deal respectively with delimitation and demarcation, are much more technical. They concern the professionals—those who are drafting or negotiating treaties, those who are actually fixing a boundary on the ground, and those who are making railways and roads, or digging for oil and minerals.

The author omits nothing. He devotes a chapter, for example, to monumentation, which means the marking and maintenance of the boundary line. There he gives advice about the inscription upon a boundary monument, or on the number of inscriptions on the monuments, on the vista or path which is to be cut where a boundary enters a forest, and so forth. There is more of art in delimitation, more of science in demarcation.

The book must surely become the standard work on its subject; and it should be immediately useful to all who have to replan the boundaries of territories in all the five continents.

Norman Bentwich.

DELEGATED LEGISLATION AND EXECUTIVE POWERS.[17]

In his interesting book *Law and Orders*, Dr. C. K. Allen makes a study of the question whether, particularly since the war of 1914-18, disproportions have manifested themselves in the Constitution of the United Kingdom which threaten to alter its balance. He

[15] *The Hindu Law in Mysore.* By M. N. Srinivasan (Bangalore Press, Mysore Road). Pp. liii, 412. Rs.10.

[16] *Boundary Making.* A handbook for statesmen, treaty-editors and boundary commissioners. By Stephen B. Jones. With a foreword by S. W. Boggs. (Carnegie Endowment for International Peace, 1945.) Pp. 268, $3.

[17] *Law and Orders.* By Carleton Kemp Allen, M.C., D.C.L., F.B.A., J.P., of Lincoln's Inn, Barrister-at-Law; Fellow of University College, Oxford; sometime Professor of Jurisprudence in the University of Oxford; Oxford Secretary to the Rhodes Trustees and Warden of Rhodes House, Oxford. (London, Stevens & Sons Ltd., 1945.) Price 15s. net.

submits that such a manifestation has occurred—that the power of the Executive has increased, that Parliament's control over it has become ineffective, and that the powers of the Judiciary to exercise supervision under the Rule of Law have been diminished. The book is concerned solely with the Parliament and Government of the United Kingdom. It should, however, prove of interest, not only at home, but also in other countries of the British Commonwealth; it may perhaps point the way to the discernment of similar developments in some of those countries, or else, by contrast, illustrate either their absence or a development in a different direction. The book should also find readers in the United States of America.

Dr. Allen advocates the adoption of various measures of improvement in minor matters, most of which, as he says, have the support of eminently qualified persons, and some of which were recommended by the Committee on Ministers' Powers. But beyond these measures he discerns " certain larger and more controversial questions which go to the root of the whole governmental order." The first is " the everlasting enigma of the boundaries of State action " which have been enormously expanded during the past century. He gives a good many instances of useless attempts to regulate detail during wartime, e.g. the " cuffs " of trousers. The test which he would apply to any particular form of State control is—will it work, and, if so, will it contribute to the sum of social good? The second question which emerges is Parliamentary sovereignty—the initiative, responsibility and authority of the Legislature. Much of the book is devoted to the subject of the decay of Parliamentary control. A more hopeful view is that this control is only dormant and that it can be, and has at times been, awakened; members of the House of Commons have recently shown themselves well able to " watch and pray." The third question is the weakening of the Rule of Law—the exclusion of the doctrine of *ultra vires* by enactments imparting to sub-legislation the same force as primary legislation, or conferring power upon the Executive to take decisions of a judicial character from which there is no appeal. For a treatment of all these matters good and abundant material is to hand, such as the observations of Parliamentary Counsel, from Thring, Jenkyns (who came after Thring, not before him), and Ilbert to Sir William Graham Harrison; Sir Cecil Carr's " Delegated Legislation " and " Concerning Administrative Law "; Reports of Parliamentary and Departmental Committees; and Judicial decisions. The value of the book lies in the excellent use to which the material has been put, its orderly exposition of the various topics and the cogent manner in which the author makes his submissions. At times he exhibits a slight tendency to make our flesh creep. "The System " presumably does not imply the existence of a " hidden hand." The chapter on " The Fountain of Justice " might give the impression that the Crown and the Departments habitually resort to sharp practice in litigation. In fact, the legal advisers are a body of most fair-minded men who constantly keep their departments in mind of justice and equity as well as the technicalities of the law. Moreover, the merits or demerits of a Crown litigation are not always apparent in the reported case.

Dr. Allen refers to a case of great legal interest which has hardly received the attention it deserves—*R.* v. *Comptroller General of Patents. Ex parte Bayer Products Ltd.* [1941], 2 K.B. 306. The Court of Appeal there held that as s. 1 (1) of the Emergency Powers (Defence) Act, 1939, authorizes His Majesty to make by Order in Council such Regulations " as appear to him to be necessary or expedient " for the specified purposes, the question is not whether the Regulations are in fact necessary or expedient but whether they appear to be so to His Majesty. The decision has been followed in later cases, and, as Dr. Allen remarks, " it places *ultra vires* in a condition of catalepsy." The powers in question are emergency powers, but the formula conferring them has appeared also in peace-time statutes. There is s. 6 of the Irish Free State (Consequential Provisions) Act, 1922, under which His Majesty may, by Order in Council, make such adaptations of enactments " as appear to him necessary or proper " as a consequence of certain events. It may be noted that two Orders in Council under that enactment came before the Court of Appeal in *R.* v. *Secretary of State for the Home Department. Ex parte Art O'Brien* [1923], 2 K.B. 361 (a *habeas corpus* application). Scrutton, L.J. held that so far as these Orders in Council purported to support an internment order of the Home Secretary they were *ultra vires* and invalid, and Atkin, L.J. had doubts as to the validity of some of the provisions. But no question was raised as to the effect of the words " as appear to him necessary or proper."

The author discusses fully the litigation which grew out of Defence Regulation 18B (relating to internment) and specially the case of *Liversidge* v. *Anderson* [1942] A.C. 206. There the main question was the interpretation of the words " if the Secretary of State has reasonable cause to believe " (that detention is necessary). In the dissenting view of Lord Atkin " reasonable cause " in English law has always meant something which a judge and jury, reviewing all the circumstances, would hold to be reasonable; it is therefore " objective " and always involves the possibility of judicial review. The opinion of the majority of Lords was that reasonable cause—under Regulation 18B—was something which existed solely in the mind of the Minister, that he alone could decide it,

and that it was not subject to challenge or judicial review, unless it could be shown that he did not hold the opinion which he professed to hold. "That," says Dr. Allen, "in its simplest terms, is the conflict between the 'objective' and the 'subjective' theories." He favours Lord Atkin's dissenting opinion, and is opposed to any further granting of "subjective" discretionary power.

Dr. Allen mentions an earlier decision of the Court of Appeal, *Thompson* v. *Farrer* (1882), 9 Q.B.D. 372, which arrived at the reverse conclusion to that reached in *Liversidge* v. *Anderson* but does not appear to have been cited in that case. *Thompson* v. *Farrer* arose out of ss. 6 and 10 of the Merchant Shipping Act, 1876; under s. 6 the Board of Trade may make an order for detaining a ship "if they have reason to believe on complaint or otherwise that a British ship is unsafe," and under s. 10 the Board are liable for damages to the owner "if it appears that there was not reasonable and probable cause" for the detention of the ship. The plaintiff successfully sued the Board for damages under s. 10. If the decision turned on the words "if it appears that" then the case is distinguishable from *Liversidge* v. *Anderson*, which turned on the words "if the Secretary of State has reasonable cause to believe that."

The reviewer may perhaps be permitted to mention *Roberts* v. *Hopwood* [1925], A.C. 578, which may not be exactly in point, but seems to supply an interesting contrast to *Liversidge* v. *Anderson*. The relevant words in *Roberts* v. *Hopwood* were contained in s. 62 of the Metropolis Management Act, 1865, and enacted that a metropolitan borough council "shall employ such servants as may be necessary and may allow to such servants such wages as [the council] think fit." A council paid to its lowest grade of workers £4 a week. These payments the district auditor found to be not wages but gratuities to the employees, and he therefore disallowed the excess over what he considered a reasonable wage and surcharged the amount of the excess upon the responsible councillors. The House of Lords held that the disallowance and surcharge were rightly made, because (among other reasons) the discretion conferred upon the council by the statute must be exercised reasonably, and the fixing by the council of an arbitrary sum for wages without regard to existing labour conditions was not an exercise of that discretion. Here is an instance of a judicial review of a power conferred in a form which was both personal and discretionary.

Dr. Allen's book has been written, as he tells us, principally as a warning against the tyranny of Totalitarianism "from whatever quarter it may come." It has been written well and its warning should not pass unheeded by those who have hitherto remained apathetic. Happily, the House of Commons has not of late been inclined to apathy regarding delegated powers It has had many debates on Defence Regulations, and has secured various concessions, including the appointment of a Committee to scrutinize Statutory Rules and Orders. And it is to be hoped that these activities in the House indicate a growing public opinion outside.

ARTHUR QUEKETT.

THE CIVIL SERVICE.

SINCE civil servants are accused of usurping the function of the legislature the law-maker cannot ignore them. In an era when social welfare has passed from haphazard voluntaryism to statutory compulsion, his success depends on the officials who administer his laws. In a concise and competent survey of *The Civil Service, its Problems and Future,*[18] Mr. Gladden discusses four types of criticism. Concerning the sweeping charges in The New Despotism, so tactfully disposed of by the Committee on Ministers' Powers, Mr. Gladden courageously remarks that Lord Hewart's chief mistake appears to have been to confuse an essential social development with a designed attack upon the vested interests of the legal profession. Next he cites a more friendly oracle, Professor Laski, whose *Democracy in Crisis* warned us that the clash between two rival philosophies in politics was at hand; the constitutionalists would do everything but concede the inevitable changes constitutionally. The civil service, a staunch ally of conservative elements, would refuse in the last resort to work the new socialist régime. This diagnosis, observes Mr. Gladden, suggests that the revolutionary must undermine the foundations of the only organization which can carry out his policies. A third criticism is the complaint that the Treasury, as the general staff of the public service, has failed to plan the needed improvements of the machinery of government in spite of a series of recommendations by departmental committees and royal commissions. This was, of course, the finding of the Sixteenth Report (1942) of the Select Committee on National Expenditure in a gay venture outside its terms of reference. The new "Organization and Methods" branches in the Treasury and other departments are hopeful signs, but the scheme of a Civil Service Staff College hangs fire. Lastly, there is the general accusation of Red Tape. Round-about ways, says Mr. Gladden, are common to all large-scale institutions. If the critics

[18] *The Civil Service, its Problems and Future.* By E. N. Gladden. (Staples Press, Ltd., 1945.) Pp. 167. 10s. 6d.

are here too often concerned to dispute the merits of State enterprise, vigilance is always needed and improvements are always possible.

Inside the service there are inevitable discontents. The system of increments, once the maximum is reached, leaves a man bumping his head for ever against an impenetrable ceiling. His contemporaries and juniors so often seem to find better openings. Equality of opportunity is difficult while educational institutions differ. There is exasperation over the predominance of Oxford and Cambridge graduates in the higher grades. Mr. Gladden would recruit fifty per cent. of the administrative class from within the service; he wants a system of " group seniority " (as in banks and insurance offices) to replace individual seniority; a new Personnel Organization Board must level the prospects on some formula of age-plus-seniority; and *pour encourager les autres* there must be demotion as well as promotion. He describes the British arrangement by which an officer, if " passed over," can appeal to the head of his department. He notes the corresponding provision in Australia for appeal to a Public Service Board whose functions are far wider than those of our Civil Service Commissioners. Against the satisfaction of the successful appellants, he says, one must place the chagrin of the displaced promotees and the disappointment of unsuccessful applicants. Australian conditions are admirably illustrated in the selected documents composing *Government in Australia*,[19] of which Professor H. E. Bland, in the course of teaching public administration in Sydney University, has now produced a second edition. Professor Bland plainly has misgivings about the impact of politics upon public service, and deprecates a tendency of civil servants to claim the right to regard politics as an alternative career to administration. Mr. Gladden names political neutrality among the qualities indispensable in an official. Mr. Rawlings, another writer from inside the service, has a different approach. His challenging book on *The Civil Service and the People*[20] depicts civil servants as " nothing but the instruments of an elaborately disguised class-domination." Their development and difficulties are due to capitalism. Nepotism was abolished because it was bad for capitalism; scientific research under State auspices was established because it was good for capitalism. The old-school-tie tradition inspires the higher civil servants who have cherished a deep-seated Toryism; what could be expected of Sir Horace Wilson (though Munich brought relief at the time to many not of one party only) or of Sir James Grigg? But the people are on the march. Vested interests will be crushed by " a politically and socially conscious civil service." In the socialist State, with a full-employment policy arising from a planned economy, there will be a rapid growth of the civil service in order to carry out the declared will of the people. Opponents " will endeavour, through the hold which they have already obtained over the State apparatus, to use the civil service to further the ends of a capitalism even more monopolistic than at present."

There is general agreement that our civil servant must loyally obey his masters. That being agreed, should he be strictly or benevolently neutral in his politics or positively belligerent? Is it malicious to suspect that the answer sometimes depends on whether they are our own politics or other peoples?

C. T. C.

INTERNATIONAL REGULATION OF FISHERIES.[21]

THE greater part of Mr. Leonard's book is taken up with an account of the principal fishery controversies which have arisen in the period from the early seventeenth century to our own time. This should prove to be most valuable for reference, since he has presented in convenient form the essential facts which otherwise are only to be found in a great number of official and historical publications. His own main interest lies in the problem of the conservation of sea fisheries, and the book ends with an elaborate scheme for the establishment of an " International Fisheries Office," which would combine the functions of an arbitration tribunal, a research centre, and an administrative body.

Mr. Leonard is right in saying that the enlargement of territorial waters would not by itself solve the problem, since its main purpose would be to serve the national interests of those States which demand this change. The same criticism applies to all proposals for the extension of a special jurisdiction beyond territorial limits. But Mr. Leonard seems to have underestimated both the importance and the complexity of this problem. For example, the interest of Great Britain in maintaining the three-mile limit is primarily strategical, and any general extension might produce the most serious consequences in time of war. Another point which Mr. Leonard seems to have missed is that the question of the base-line of territorial waters may often be even more important than the question

[19] *Government in Australia.* Selected Readings edited, with introduction, by F. A. Bland, Professor of Public Administration, University of Sydney. A. H. Pettifer, Acting Government Printer, Sydney, N.S.W. 2nd edition ; 1944. Pp. liv, 761.

[20] *The Civil Service and the People.* By R. W. Rawlings. (Lawrence and Wishart, 1945.) Pp. 162. 7s. 6d.

[21] *International Regulation of Fisheries.* By L. Larry Leonard. (Carnegie Endowment, Washington 1944.) xii+201 pp. 10s.

of the width of the zone itself. Thus there may be no serious difficulty in conceding the traditional claim of the Scandinavian countries to a four-mile zone, but it would be impossible for Great Britain to agree to the Norwegian decree of July, 1935, which draws a base-line by linking up all islands and rocks, irrespective of their distance from the shore or from one another. Such a claim would bring thousands of square miles of the sea within the interior waters of Norway, and the strategic objections to it are unanswerable. Similar problems also arise upon other coasts. It may be suggested that Mr. Leonard should devote further study to the extensive literature upon the Scandinavian problem.

The truth is that the uses of the sea are manifold, and the law of the sea must take account of them all. The real difficulty in the way of Mr. Leonard's proposed organization is that it would subordinate all other maritime problems to one special interest, the conservation of sea fisheries. In particular, it is most unlikely that maritime States would tolerate the proposed right of international interference within territorial waters, but this power is an essential part of Mr. Leonard's scheme.

It is interesting to read how Japanese policy has been persistently opposed to the principle of common action, and it may be hoped that one consequence of the Japanese defeat will be an improvement of the situation in the North Pacific.

H. A. S.

NEW ZEALAND AND THE STATUTE OF WESTMINSTER.[22]

At the opening of the New Zealand Parliament on February 22, 1944, the Governor-General announced that his Ministers proposed to place before Parliament the question of the adoption of the Statute of Westminster. The Statute was passed in 1931, on the request and consent of the several Dominions, including New Zealand. But by s. 10 the substantive provisions of the Statute—those dealing with the repugnancy principle, the extra-territoriality of Dominion legislation, and the non-application of United Kingdom Acts without the consent of the Dominion—were not to extend to Australia, New Zealand or Newfoundland unless an Act of the Dominion Parliament so provided. Newfoundland shortly afterwards ceased to be a Dominion; Australia did not adopt the Statute until 1942. New Zealand, notwithstanding the proposal put forward by the Government last year, has not yet adopted the Statute, but the proposal was the occasion of two interesting publications which have reached the *Journal*.

New Zealand and the Statute of Westminster is a volume comprising five lectures delivered at Victoria University College, Wellington, by members of the staff—two historians, a lawyer and a political scientist. Dr. Beaglehole, the Editor, in his first lecture deals with the old Empire of authority and subordination and its transition to the new Empire built on a basis of autonomy and mutual consultation. His second lecture gives a precise account of the events which led up to the "Balfour declaration" embodied in the report of the Imperial Conference Committee, 1926, the subsequent Legislation Conference of 1929, and the Imperial Conference of 1930. He shows the constitutional changes which had taken place in the status of the Dominions and their relations with the United Kingdom, and concludes that: "The logical necessity of some statute or statutes to give legal reality and precision to the broad principles of autonomy must now be apparent. Any such statute must be a statute of the imperial parliament. In the end one statute was made to do as much work as possible. It was the Statute of Westminster, 1931." Professor McGechan treats the question as a lawyer, producing convincing legal arguments in support of his submission: "Adoption of the Statute is merely a matter of bringing legal form into line with political status; and you can measure the need to adopt the Statute by the degree of inconvenience caused by the gap between the status and legal capacity." Professor McGechan mentions the unfortunate effect of s. 8 of the Statute, which will necessitate further imperial legislation after adoption of the Statute in order to free the Dominion from doubts as to its power to amend the New Zealand constitution. Professor Wood in his lecture examines the economic and political limitations on Dominion status, but holds that the structure of the British Commonwealth of Nations has gone a long way towards removing the inequalities arising from differences in physical size and strength among its members, and has done something towards making economic contacts a matter of co-operation rather than conflict. Professor Leslie Lipson contributes a brilliant lecture on the principles which should animate a foreign policy for New Zealand, illustrating the necessity for this purpose of the adoption of the Statute. All the arguments for adoption are clearly put in this series of lectures. "But," as Dr. Beaglehole remarks, "New Zealanders are an empirical people; they have never been prone to political theory, and its statement has generally alarmed them." And Professor Lipson puts it thus: "They have felt these islands

[22] *New Zealand and the Statute of Westminster.* Five Lectures by J. C. Beaglehole, F. L. W. Wood, Leslie Lipson, R. O. McGechan, edited by J. C. Beaglehole. (Wellington, Victoria University College, 1944.) Price 10s. 6d.

to be a fragment of the British Isles which, by some oversight of the Creator, was put on the wrong side of the globe." The volume is most attractively printed and produced.

Mr. A. E. Currie's short treatise on the Statute of Westminster[23] was likewise occasioned by the Governor-General's announcement to the New Zealand Parliament. His object is to supply as briefly as possible such information as may enable the practical effect of adoption to be appreciated, and a statement of what adoption will do and will not do. The character of his treatise is legal, and it would commend itself to a draftsman seeking out the points on which " consequential provisions " would be wanted in the event of the adoption of the Statute. He refers, for instance, to s. 8, which " saves " the New Zealand Constitution Act; until that Act has been modified (by or in pursuance of an imperial Act), certain obsolete restrictions on the independence of the Parliament will remain on the statute book.

A. Q.

The following publications have also been received[1]:—

Appadonai, A. *The Substance of Politics.* (Oxford University Press: Humphrey Milford.) Pp. viii. 528. 10s. 6d.

Arquivo de Direito Militar. Ano II. n. 3. Janeiro a Abril de 1944. Pp. 496.

Attention has already been drawn in the *Journal* (Vol. xxv, November, 1943, p. 102) to a previous issue of this important publication. The contents of the present issue are of especial interest. The full text of the Military Penal Code of Brazil of 1944 (pp. 407-477) is preceded by a valuable contribution dealing with the history of Military Penal Law in Brazil and giving the opinions of eminent authorities on the said Code. The Editor (Senhor Auditor Carneiro) explains in an admirable study the Constitutional aspects of Military Justice in Brazil. VLADIMIR IDELSON.

Better Business Unlimited. No. 2. (Hamilton, N.Z.: Employee-Partnership Institute.) Pp. 49. 2s.

Bradway, John S. *Legal Aid Clinic Instruction at Duke University.* (Durham, N.C.: Duke University Press.) Pp. ix. 126. $1.50.

British Year Book of International Law, 1944. 21st Year. (Oxford University Press: Humphrey Milford.) Pp. vii. 272. 25s.

Clerks-at-the-Table in Empire Parliaments, Journal of the Society of, 1942 and 1943. Vols. XI and XII. (London: Butterworth and Co. Ltd.) Pp. iii. 292. £2.

Cory, Hans, and Hartnoll, M. M. *Customary Law of the Haya Tribe.* (London: Percy Lund, Humphries and Co.) Pp. 299.

Egerton, Robert. *Legal Aid.* (London: Kegan Paul, Trench, Trubner and Co.) Pp. xvi. 150. 10s. 6d.

Fraenkel, Ernst. *Military Occupation and the Rule of Law.* (Oxford University Press: Humphrey Milford.) Pp. xi. 267.

Galloway, G. B. *The Reorganization of Congress.* (Washington, D.C.: American Council on Public Affairs.) Pp. 89. $1.00.

In January, 1941, the American Political Science Association appointed a Committee on American Legislatures and Legislative Methods who decided to confine themselves to consideration of Congress itself. The result of their deliberations is embodied in this report with recommendations for strengthening Congress and improving its relationships.

Garrana, Hassan Rached. *Law Legislation D'Origine Gouvernementale.* (Cairo: Imprimerie Nationale Boulac.) Pp. 493-662. P.T.40.

Glueck, Sheldon, and Eleanor T. *After-Conduct of Discharged Offenders.* (London: Macmillan and Co. Ltd.) Pp. xvi. 114. 8s. 6d.

This is a study under the auspices of the Department of Criminal Science of the Faculty of Law in the University of Cambridge. It contains an investigation of the antecedents of a thousand adolescents and five hundred male and five hundred female adult offenders. Professor Winfield commends it as a contribution to the answer of the question " What practical help can I get, pending all the social and administrative reforms that are needed for an ideal criminal system, in dealing with those who are convicted in my court of some crime?"

Gottschalk, R. *Impossibility of Performance in Contract.* (London: Stevens and Sons.) Pp. xvi. 146. 10s.

Grotius Society Transactions. *Proceedings of the International Law Conference.* (London: Longmans Green and Co. Ltd.) Pp. 141. 15s.

Grotius Society. *Problems of Peace and War.* Vol. 30. London: Longmans Green and Co. Ltd.) Pp. xiv. 287. 15s.

[23] *New Zealand and the Statute of Westminster,* 1931. By A. E. Currie. (Butterworth & Co. (Aus.) Ltd., Wellington, N.Z., 1944.) Price 3s. 6d.

[1] Mention here does not preclude review later.

India. *Unrepealed Central Acts.* Vol. XI. (Simla: Government of India Press.) Pp. vi. 210. 4s.

India. *General Orders of the Central Government under the Defence of India Rules.* Parts 1 and 2. (Delhi: Manager of Publications.) Pp. 338. 10s. Pp. 143. 7s.

India. *Supplement to General Rules and Orders.* Vols. VI, VII, VIII. (Delhi: Government of India Press.) Pp. 489. 27s. Pp. 280. 19s. Pp. 358. 20s. 6d.

International Labour Office. *A New Era.* (Montreal: I.L.O.) Pp. 145. 4s.

The International Labour Office have published in a convenient form a report of the Philadelphia Conference and its proposals for the future of the I.L.O. which were noticed in the *Journal*, vol. xxvi, page 63.

International Labour Conference. *Matters Arising out of the Work of the Constitutional Committee.* (Montreal: I.L.O.) 1945. Pp. xiv. 165.

This report continues the preceding and makes suggestions in respect to the relationship of the I.L.O. and other international bodies. The first chapter outlines the new framework of international organization established by the Charter of the United Nations and other recent decisions. In the second chapter are recapitulated decisions and statements of policy already made by the I.L.O. with regard to its place. From the changed conditions arise a series of problems with respect to the transformation of the I.L.O. from its former relationship into the new one, and these are discussed in the third chapter. The procedure to be followed in dealing with these questions is the subject of a fourth chapter leading to a series of resolutions covering the different points of the new relationship.

Jenks, C. Wilfred. *The Headquarters of International Institutions.* (London: Royal Institute of International Affairs.) Pp. 102. 6s.

Lachmann, Kurt. *"Common Sense" Today.* (London: Torchstream Books.) Pp. 44. 2s. 6d.

Lachs, Manfred. *War Crimes.* (London: Stevens and Sons, Ltd.) Pp. viii. 108. 7s. 6d.

Lauterpacht, H. *An International Bill of the Rights of Man.* (Columbia University Press: Humphrey Milford.) Pp. x. 230. 20s.

Law and Economics. Edited by Dr. Samuel Eisenstadt. (Tel-Aviv: Redaction and Administration.) Pp. 94.

League of Nations. *Report on the Work of the League, 1943-1944.* (Geneva, 1945.) 2s.

Modern Approach to Criminal Law. Edited by L. Radzinowicz and J. W. C. Turner. (London: Macmillan and Co.) Pp. ix. 511. 21s.

Nadelman, Kurt H. *Bankruptcy Treaties.* (Reprinted from *Pennsylvania Law Review*, September, 1944.) Pp. 39.

Nashat, Mohammed Aly. *Ibn Khaldain, Pioneer Economist.* (Cairo: Imprimerie National Boulac.) Pp. 490. P.T.20.

North Carolina Bar Association. *Report of Committee on Legal Education.* Pp. 31.

Oppenheim's International Law. Vol II, 6th Edition Revised. Edited by H. Lauterpacht. (London: Longmans Green and Co.) Pp. xliv. 766. 50s.

Peaslee, Amos J. *United Nations Government.* (N.Y.: G. P. Putnam's Sons.) Pp. 183. $2.00.

Polish and Comparative Law Studies. (London: Stevens and Sons.) Pp. vii. 274.

Pritchard, Sir Harry G. *Middlesex County Council Act* 1944. Annotated. (London: Solicitors' Law Stationery Society.) Pp. lv. 408.

Ramaswamy, M. *Distribution of Legislative Powers in the Future Indian Federation.* (London: Longmans Green and Co.) Pp. xii. 78. 7s. 6d.

Revista Juridica de la Universidad de Puerto Rico. Vol. XII. n. 4. Marzo-Abril, 1944.

This issue completes the 13th volume of the *Revista.* Students of comparative law will be greatly interested in the annotations to the Civil Code of Puerto Rico by Professor Sgr. Morales and in the reports on recent decisions of the Supreme Court of that country. Professor Sgr. Charriez writes on Doctrine of Drago and Dr. Max Rheinstein on Military Justice. The *Revista* is published under the direction of Professor Sgr. Valasquez assisted by a Committee of jurists, including Sgr. Arrillaga, the Editor in chief.

VLADIMIR IDELSON.

Rider, Fremont. *The Scholar and the Future of the Research Library.* (N.Y.: Hadham Press.) Pp. xiii. 236.

Salmond and Williams on Contracts. Second Edition by J. Williams. (London: Sweet and Maxwell, Ltd.) Pp. xxxvi. 640. £1 15s.

Schlesinger, Rudolf. *Soviet Legal Theory*. (London: Kegan Paul, Trench, Trubner and Co.) Pp. viii. 299. 16s.

Schwarzenberger, G. *International Law*. Vol. I. (London: Stevens and Sons, Ltd.) Pp. xliv. 654. £3.

South Australian Industrial Reports. Vol. XVI, 1940-1941. Vol. XVII, 1942-1943. Edited by G. C. Douglas Bowen. (Adelaide: Government Printer.) Pp. viii. 420. xi. Pp. viii. 459. xii.

Stone, Julius. *Recent Trends in English Precedent*. (Sydney: Associated General Publications, Ltd.) Pp. vi. 76. 10s. 6d.

Tel-Aviv University. *Regulations and Syllabuses for year* 1944/45 *of the Law and Economics School*. Pp. 30.

Uganda, Index to Laws. Compiled by Leo Gama. (Uganda: Government Printer.) Pp. 88. Sh. 12/50.

Wolff, Martin. *Private International Law*. (Oxford University Press: Humphrey Milford.) Pp. xliv. 637. 35s.

Zulueta, F. de. *Roman Law of Sale*. (Oxford University Press: Humphrey Milford.) Pp. xi. 264. 21s.

The following periodicals have also been received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Arquivo de Direito Militar; Australian Law Journal; Bombay Law Journal; Bombay Law Reporter; Calcutta Weekly Notes; Canadian Bar Revew; Colombia Law Review; Eugenics Review; Hapraklit; Hindustan Review; International Labour Review; International Review of Agriculture; Journal of the Parliaments of the Empire; Juridical Review; Law Quarterly Review; Madras Law Journal; Medico-Legal Review; Modern Law Review; Revista Juridica de la Universidad de Puerto Rico; Revue International de la Croix Rouge; South African Law Journal; Toronto University Law Review; Tulane Law Review.

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